92-833

No. _____

SUPREME COURT, U.S.
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In The

Supreme Court of the United States

October Term, 1992

KEVIN ALBRIGHT,

Petitioner,

vs.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and the CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does a baseless prosecution, initiated and pursued without an objectively reasonable belief in the existence of probable cause to suspect the accused of criminal wrongdoing, infringe liberty protected by the Due Process Clause and thereby permit an action pursuant to 42 U.S.C. § 1983 absent incarceration or other accompanying loss or alteration of a "protected status" such as that recognized in *Paul v. Davis*, 424 U.S. 693 (1976)?

PARTIES IN THE COURT BELOW

Petitioner, Kevin Albright, was the plaintiff-appellant in the court below. Respondents Roger Oliver, individually and in his official capacity as a police detective with the city of Macomb, Illinois and the city of Macomb, Illinois, an Illinois municipal corporation, were the Defendants-Appellees below.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES IN THE COURT BELOW	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT:	
A. THE SEVENTH CIRCUIT'S DECISION PLACES IT IN CLEAR CONFLICT WITH THE SECOND, THIRD, FOURTH, FIFTH, TENTH AND ELEVENTH CIRCUITS, AND LESS CLEAR CONFLICT WITH THE FIRST, SIXTH AND NINTH CIRCUITS	10
B. THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS GIVING CONSTITUTIONAL PROTECTION AGAINST OBJECTIVELY UNREASONABLE SEARCHES AND SEIZURES, ESTABLISHING THE DUE PROCESS REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN CRIMINAL CASES, AND DEFINING THE INTERESTS PROTECTED BY THE SPEEDY TRIAL GUARANTEE, ALL OF WHICH ESTABLISH THE LIBERTY SUBJECT TO CONSTITUTIONAL PROTECTION AGAINST OBJECTIVELY UNREASONABLE PROSECUTIONS	15

TABLE OF CONTENTS – Continued

Page

C. THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT, IS LIKELY TO RECUR, AND, THEREFORE, SHOULD BE SETTLED BY THIS COURT . 27

CONCLUSION 28

APPENDIX A 1a

APPENDIX B..... 13a

APPENDIX C 27a

APPENDIX D 29a

APPENDIX E..... 31a

APPENDIX F..... 34a

APPENDIX G..... 35a

APPENDIX H 84a

TABLE OF AUTHORITIES

Page

CASES

Adams v. Williams, 407 U.S. 143 (1972)..... 18

Anderson v. Creighton, 483 U.S. 635 (1987) 17, 18, 20

Baker v. McCollan, 443 U.S. 137 (1979)..... 25

Barker v. Wingo, 407 U.S. 514 (1972)..... 23

Brinegar v. U.S., 338 U.S. 160 (1949)...16, 17, 20, 23, 26

Briscoe v. LaHue, 460 U.S. 325 (1983) 20

Brummett v. Camble, 946 F.2d 1178 (5th Cir. 1991) ... 10, 12

Buckey v. County of Los Angeles, 957 F.2d 652 (9th Cir. 1992), amended 968 F.2d 791 (9th Cir. 1992) 28

Buckley v. Fitzsimmons, 919 F.2d 1230, vacated ___ U.S. ___, 112 U.S. 40 (1991), affirmed on remand, 952 F.2d 965 (7th Cir. 1992), cert. granted, No. 91-7849, ___ U.S. ___ (Oct. 5, 1992) 22

Campbell v. Brummett, ___ U.S. ___, 119 L.Ed.2d 241 (1992) 10

Carroll v. U.S., 267 U.S. 132 (1925) 16, 17

Cerbone v. Conway, 479 U.S. 84 (1986) 28

City of Manhattan Beach v. Buckey, U.S. Supreme Court NO. 92-560 28

Coffin v. U.S., 156 U.S. 432 (1895)..... 19

Collins v. Harker Heights, 503 U.S. ___, 117 L.Ed.2d 261 (1992)..... 24

TABLE OF AUTHORITIES – Continued

Page

Coogan v. City of Wixom, 820 F.2d 170 (6th Cir. 1987) 14

Cornelius v. Highland Lake, 880 F.2d 348 (11th Cir. 1989) 27

Daniels v. Williams, 474 U.S. 327 (1986) 25, 26

Davidson v. Cannon, 474 U.S. 344 (1986) 25, 26

DeShaney v. Winnebago County, 489 U.S. 189 (1989) .. 24, 26

Doggett v. U.S., 505 U.S. ___, 120 L.Ed.2d 520 (1992) 22

Draper v. U.S., 358 U.S. 307 (1959) 16, 18

Dunn v. Tennessee, 697 F.2d 121 (6th Cir. 1982) 14

Easter House v. Felder, 910 F.2d 1387 (7th Cir. 1990) 14

Franks v. Delaware, 438 U.S. 154 (1977) 15

Freeman v. Ferguson, 911 F.2d 52 (8th Cir. 1990) 27

Friedman v. Village of Skokie, 763 F.2d 236 (7th Cir. 1985) 14

Frye v. O'Neill, 166 Ill.App.3d 963 (4th Dist. 1988) 11

Gerstein v. Pugh, 420 U.S. 103 (1975) 12, 16, 18

Golino v. New Haven, 950 F.2d 864 (2d Cir. 1991) 12

Goodwin v. Metts, 885 F.2d 157 (4th Cir. 1989) 12, 13

Gregory v. City of Rogers, 921 F.2d 750 (8th Cir. 1990) 27

Hampton v. Hanrahan, 600 F.2d 600 (7th Cir. 1979) 14

Hand v. Gary, 832 F.2d 1420 (5th Cir. 1988) 12

TABLE OF AUTHORITIES – Continued

Page

Harlow v. Fitzgerald, 457 U.S. 800 (1982) 18

Illinois v. Gates, 462 U.S. 213 (1983) 16, 18

In Re Winship, 397 U.S. 358 (1970) 15, 19

Jackson v. Virginia, 443 U.S. 307 (1979) ..... *passim*

Jones v. City of Chicago, 856 F.2d 985 (7th Cir. 1988) . 13, 19

Karim - Panahi v. L.A. Police Dept., 839 F.2d 621 (9th Cir. 1988) 14

Klopfer v. North Carolina, 386 U.S. 213 (1967) .... *passim*

Lee v. Mihalich, 847 F.2d 66 (3d Cir. 1988) 11, 14

Locke v. U.S., 11 U.S. (7 Cranch) 339 (1813) 20

Malley v. Briggs, 475 U.S. 335 (1986) ..... *passim*

Mapp v. Ohio, 367 U.S. 643 (1961) 19, 24

Memorial Hospital v. Maricopa County, 415 U.S. 250 (1974) 23

Monroe v. Pape, 365 U.S. 167 (1961) 26

Olmstead v. U.S., 277 U.S. 438 (1928) 25

Paul v. Davis, 424 U.S. 693 (1976) 4, 22, 25, 26

Payton v. New York, 445 U.S. 573 (1980) 16

Robinson v. Maruffi, 895 F.2d 649 (10th Cir. 1989) 12

Rochin v. California, 342 U.S. 165 (1952) 14

Rose v. Bartle, 871 F.2d 331 (3d Cir. 1989) 11, 14

Saunders v. English, 950 F.2d 1152 (5th Cir. 1992) 12

TABLE OF AUTHORITIES – Continued

Page

Schneckloth v. Bustamonte, 412 U.S. 218 (1973) 16

Shapiro v. Thompson, 394 U.S. 618 (1969) 23

Smith v. Massachusetts Dept. of Corrections, 936 F.2d 1390 (1st Cir. 1991) 14

Strength v. Hubert, 854 F.2d 421 (11th Cir. 1988) 12

Strunk v. U.S., 412 U.S. 434 (1973) 24, 25

Torres v. Superintendent of Police, 893 F.2d 404 (1st Cir. 1990) 13, 14

Usher v. City of Los Angeles, 828 F.2d 556 (9th Cir. 1987) 14

U.S. v. Calandra, 414 U.S. 338 (1974) 12

U.S. v. Guest, 383 U.S. 745 (1966) 23

U.S. v. Leon, 468 U.S. 897 (1984) 17, 18

U.S. v. MacDonald, 456 U.S. 1 (1982) 23, 24

U.S. v. Marion, 404 U.S. 307 (1971) 13, 16, 23, 25

Villanova v. Abrams, 972 F.2d 792 (7th Cir. 1992) 19

Wheeler v. Cosden Oil & Chemical Co., 734 F.2d 254 (5th Cir. 1984) 12

White v. Frank, 855 F.2d 956 (2d Cir. 1988) 12, 26

Wood v. Ostrander, 879 F.2d 583 (9th Cir. 1989) 27

Young v. U.S., 481 U.S. 787 (1987) 22, 25

CONSTITUTIONS

United States Constitution, Amendment IV 2, 15, 16, 19, 26

United States Constitution, Amendment VI 2, 24, 26

United States Constitution, Amendment XIV, §1 ..... 3, 26

TABLE OF AUTHORITIES – Continued

Page

STATUTES

Ill.Rev.Stat. Ch. 38 §109-3 8

Ill.Rev.Stat. Ch. 38 §110-7(a) 8

Ill.Rev.Stat. Ch. 38 §110-7(f) 8

Ill.Rev.Stat. Ch. 38 §110-10(a)(3) 9

Ill.Rev.Stat. Ch. 38 §111-2(d) 8

Ill.Rev.Stat. Ch. 56 1/2 §1404(b) 6, 9

Ill.Rev.Stat. Ch. 85 §8-101 25

28 U.S.C. §1254(1) 2

28 U.S.C. §1331 4

28 U.S.C. §1343 4

42 U.S.C. §1983 ..... *passim*

RULES

Rule 12(b)6, Fed.R.Civ.P. 4

MISCELLANEOUS

Currie, *Positive and Negative Constitutional Rights*, 53 U.Chi.L.Rev. 864 (1985) 24

T. Gorski, *Managing Cocaine Craving*, Hazeldon Educational Materials, ISBN: 0-89486-674-5 at 1, 8 (1990) 5

National Institute on Drug Abuse, Dept. of Health and Human Services, Pub. No. (ADM)88-1559, *When Cocaine Affects Someone You Love*, 4 (1987) 5

TABLE OF AUTHORITIES – Continued

Page

Rattner, *Convicted But Innocent*, 12 Law & Human Behavior 283 (1988) 20

Rawson, Obert and McCann, *Cocaine: Recovery Issues*, May/June Addiction & Recovery, 29, 30-32 (1991) 5

Restatement 2d Torts §653 11

Washton and Stone-Washton, *Abstinence and Relapse in Outpatient Cocaine Addicts*, 22 J. Psychoactive Drugs 135 (1990) 5

C. Wolfram, *Modern Legal Ethics*, 460 (1986) 22

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Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Kevin Albright, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit affirming dismissal of Petitioner's complaint by the United States District Court for the Central District of Illinois, Peoria Division, (Mihm, J.).

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 975 F.2d 343. The opinion and order of the district court (Mihm, J.) (App. B, *infra*, 13a-26a), is not reported.

JURISDICTION

The judgment of the court of appeals (App. C, *infra* 27a), was entered September 14, 1992. This Petition for Certiorari is being brought within 90 days of that judgment as Petitioner did not seek rehearing in the court of appeals. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND OTHER PROVISIONS INVOLVED

A. United States Constitution, Amendment IV.

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

B. United States Constitution, Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed

> . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for its defense.

C. United States Constitution, Amendment XIV, §1.

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny any person within its jurisdiction of the equal protection of the laws.

D. 42 U.S.C. §1983

> Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

STATEMENT OF THE CASE

Petitioner, Kevin Albright, sued Respondents, Macomb, Illinois police detective Roger Oliver and the city of Macomb, Illinois under 42 U.S.C. §1983. He alleged a

deprivation of rights secured by the Due Process Clause of the Fourteenth Amendment deriving from his baseless criminal prosecution by Oliver in Illinois state court. Albright invoked the district court's jurisdiction under 28 U.S.C. §§1331 and 1343.

The district court dismissed, pursuant to Rule 12(b)6, Fed.R.Civ.P., Albright's claims alleging a wrongful prosecution as a cause of action under §1983.[1] The court of appeals affirmed. It said that although this Court had not resolved whether a malicious prosecution violated the Constitution, its decision in *Paul v. Davis*, 424 U.S. 693 (1976), holding that defamation by a public officer is not a constitutional tort, "provides a clue to the answer that [this] Court is likely to give. . . . " App. 5a. The court of appeals said that the actions of Oliver were "shocking", and "may well have . . . exceeded" "[t]he limits of reasonable police conduct". App. 4a. But, "in the absence of incarceration or other palpable consequences", the court held Oliver's conduct was not actionable as a constitutional wrong. App. 9a.

The complaint[2] alleged that in March, 1987, Veda Moore, recently released from a rehabilitation hospital for a cocaine addiction, asked Oliver for "police protection"

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[1] The district court also ruled that Oliver was entitled to qualified immunity and that the complaint did not sufficiently allege a policy on the part of the city of Macomb. App. B, 24a-26a. The Petitioner voluntarily dismissed a common law malicious prosecution claim. App. D, 29a-30a. The district court permitted plaintiff to amend after it had entered its order dismissing plaintiff's claims. App. E, 31a-33a. The judgment of the district court appears as App. F, 34a, *infra*.

[2] App. G, *infra*, 35a-83a.

from a drug dealer who was threatening her for non-payment of cocaine debts. Oliver agreed to give her police protection on the condition she serve as an informant by making purchases of cocaine and other controlled substances throughout Macomb, Illinois, a university town of approximately 25,000.

Oliver did not direct Moore to individuals whom he suspected or had probable cause to believe were engaged in illegal activity. Instead, he told her to make purchases from people whom she would identify as engaged in such activity. Oliver arranged to give her between $100 – $125 with which to make the purchases. He agreed to pay her between $50.00 to $75.00 for purchases she would represent as being of controlled substances.

The complaint alleged that because of her cocaine addiction, Oliver knew or should have known that it was beyond Moore's physical and emotional power to control her craving for cocaine.[3] The complaint alleged that he knew or should have known it was unreasonable to place her in a position where she was being asked to make purchases of the very substance to which she was addicted.

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[3] T. Gorski, *Managing Cocaine Craving*, Hazeldon Educational Materials, ISBN: 0-89486-674-5 at 1, 8 (1990); National Institute on Drug Abuse, Dept. of Health and Human Services, Pub. No. (ADM)88-1559, *When Cocaine Affects Someone You Love*, 4 (1987); Washton and Stone-Washton, *Abstinence and Relapse in Outpatient Cocaine Addicts*, 22 J. Psychoactive Drugs 135 (1990); Rawson, Obert and McCann, *Cocaine: Recovery Issues*, May/June Addiction & Recovery, 29, 30-32 (1991).

Over the spring and summer of 1987, Moore represented to Oliver that she made purchases of primarily cocaine from over 50 separate individuals. Among the purchases she said was a purchase of cocaine from Kevin Albright at a room of a student and transient bar and hotel, on July 17, 1987. Albright and the other 50 people were separately prosecuted under various criminal statutes. All of those prosecutions were dismissed or otherwise aborted without convictions.

Most prosecutions, including Albright's, were hindered from the beginning because what Moore represented was cocaine was, in fact, baking powder. The prosecution of Albright was further hindered because he was the third individual Oliver had charged with selling Moore the same substance from the hotel on July 17, 1987. He implicated Kevin's father, John Albright, Jr., and his older brother, John David Albright, before him in that putative transaction.

That sequence began when, on the basis of information given him by Moore, Oliver testified before a McDonough County, Illinois grand jury on September 10, 1987, that John Albright, Jr. sold her a "look-alike" substance contrary to *Ill.Rev.Stat.* Ch. 56½ §1404(b).[4] The grand jury indicted John Albright Jr. and a warrant issued for his arrest. When Oliver went to arrest John Albright,

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[4] *Ill.Rev.Stat.* Ch. 56 ½ §1404(b) provides, "it is unlawful for any person knowingly to manufacture, distribute, advertise, or possess with intent to manufacture or distribute a look-alike substance. Any person who violates this subsection (b) shall be guilty of a Class 3 felony, the fine for which shall not exceed $150,000.00."

Jr. on September 28, 1987, he learned from John Albright Jr.'s wife that Albright was a man over 60 years of age, a retired registered pharmacist, and not likely the type who would have known or dealt with Moore, or sold her what he represented was cocaine from a room in a student – transient hotel.

Oliver also learned from Mrs. John Albright, Jr. that the Albrights had two sons, Kevin and John David Albright. Oliver assumed he was looking for John David Albright. He scratched the name John Albright, Jr. from the arrest warrant and replaced it with the name John David Albright without further investigation.

By September 28, 1987, John David Albright was living in Chicago where, since September, 1986, he had worked managing a restaurant. He had been so engaged at the time Oliver accused him of selling a "look-alike" substance to Moore in Macomb. Upon learning of the warrant for his arrest, John David Albright traveled on October 1, 1987, 200 miles to Macomb from Chicago and advised Oliver of those facts.

On the basis of what John David Albright told him, Oliver telephoned Moore who, by October 1, lived in Florida, and told her that neither John Albright, Jr. nor John David Albright could have sold her what was represented as cocaine. Oliver suggested to Moore it might have been John David's brother, Kevin, from whom she made the purchase. Moore agreed. Oliver then scratched John David Albright's name from the arrest warrant and replaced it with Kevin Albright's.

However, since the grand jury's indictment of John Albright, Jr. would not support the arrest of someone

named Kevin Albright, on October 16, 1987, Oliver attested to a criminal information charging that on July 17, 1987, Kevin Albright had sold the "look-alike" substance to Moore and a warrant issued for Kevin Albright's arrest.[5] Albright surrendered and advised Oliver that he was in Macomb on July 17, 1987, but did not sell anything to Moore and was not otherwise involved in drug activity. Oliver placed Albright under arrest and required that he post bond of $3,500.00. Albright did that by paying a non-refundable 10% of that sum to the Illinois Circuit Court Clerk.[6]

On January 5, 1988, Oliver testified at a preliminary hearing that Kevin Albright sold the "look-alike" substance to Moore on July 17, 1987. Oliver did not bring to the court's attention his testimony under oath four months earlier to the grand jury that John Albright, Jr.

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[5] In Illinois when the prosecution of a felony is begun by the filing of an information, the court is required to "immediately issue a warrant for the arrest [of the person charged]." *Ill.Rev.Stat.* Ch. 38 §111-2(d). Thereafter, a preliminary hearing is required to determine, "if from the evidence that appears there is probable cause to believe an offense has been committed . . . ". *Ill.Rev.Stat.* Ch. 38 §109-3.

[6] *Ill.Rev.Stat.* Ch. 38 §110-7(a) and (f) provide in relevant part as follows: (a) "the person for whom bail has been set shall execute the bail bond and deposit with the clerk of the court before which the proceeding is pending a sum of money equal to 10% of the bail, but in no event shall such deposit be less than $25.00"; and (f) "when the conditions of the bail bond have been performed and the accused has been discharged from all obligations and the cause the clerk of the court shall return to the accused, unless the court orders otherwise, 90% of the sum which had been deposited and shall retain as bail bond costs 10% of the amount deposited.

had sold the same "look-alike" substance to Moore on July 17. He did not advise that he had accused John David Albright of the same offense. He did not advise of Moore's cocaine addiction or that he was unable to corroborate any of the information she had given him including the nature of the substance. Because of those omissions, probable cause was found.

On June 27, 1988, the Illinois Circuit Court dismissed the criminal action against Kevin Albright on the grounds that the charge did not state an offense under *Ill.Rev.Stat.* Ch. 56½ §1404(b). During the period while the prosecution pended, Albright was, by a statutorily mandated condition of his bond, restricted in his travel to the territorial limits of Illinois.[7] By reason of that restriction and the legal cost to remove it, Albright did not travel to St. Louis to interview for employment opportunities available after he completed what was then his senior year at Western Illinois University. During the pendency of the prosecution, there was media coverage. To the extent that coverage identified Kevin Albright as linked to narcotics trafficking, it was false in fact.

Up to the dismissal of the charges against Albright, Oliver had relied exclusively on what Moore told him. He attempted no independent verification by the use of such as marked bills, eavesdropping devices, or personal surveillance. He did not independently inquire what Moore

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[7] *Ill.Rev.Stat.* Ch. 38 §110-10(a)(3) provides:

(a) If a person is admitted to bail before conviction the conditions of the bail bond shall be that he will: . . .

(3) Not depart this State without leave.

had done when she said she purchased cocaine from any of the Albrights at the hotel on July 17, 1987.

Incident to Oliver's investigation, Moore purchased cocaine for herself with the money ($7-10,000) he had paid her. As a result, she suffered a relapse and her cocaine addiction worsened resulting in her hospitalization for two months beginning January, 1988.

REASONS FOR GRANTING THE WRIT

A.

THE SEVENTH CIRCUIT'S DECISION PLACES IT IN CLEAR CONFLICT WITH THE SECOND, THIRD, FOURTH, FIFTH, TENTH AND ELEVENTH CIRCUITS, AND LESS CLEAR CONFLICT WITH THE FIRST, SIXTH AND NINTH CIRCUITS.

Dissenting from the denial of certiorari in *Campbell v. Brummett*, ___ U.S. ___, 119 L.Ed.2d 241, 242 (1992), and noting the "clear disagreement among the courts of appeals", Justice White said that whether a malicious prosecution stated a cause of action under §1983 "is an area of law that requires [this Court's] attention." In her opinion for the Fifth Circuit in *Brummett v. Camble*, 946 F.2d 1178, 1180-81 n.2 (5th Cir. 1991), Judge Jones, after noting the Circuits "ha[d] flip-flopped on the constitutional tort status of malicious prosecution", said, "the Supreme Court may have to decide this question someday." And, writing for the Seventh Circuit in this case, Judge Posner observed that "this is a question on which there is an embarrassing diversity of judicial opinion." App. 5a.

Prior to the Seventh Circuit's decision in this case, there may have been "an embarrassing diversity of judicial opinion". *Id.* However, no Circuit had explicitly held that a malicious prosecution by itself did not violate the Constitution in some respect and, thereby permit an action under 42 U.S.C. §1983. Instead, there was a wide range of often conflicting reasons why a malicious prosecution might violate the Constitution and thereby be actionable under §1983.

At the most permissive end of the range are cases such as the Third Circuit's decisions in *Lee v. Mihalich*, 847 F.2d 66, 70 (3d Cir. 1988), and *Rose v. Bartle*, 871 F.2d 331, 348-49 (3d Cir. 1989). Those cases said that a malicious prosecution coextensive with the common law tort[8] violates the Constitution and is, for that reason, actionable under §1983.

The basic constitutional theory underlying such as *Lee v. Mihalich*, and *Rose v. Bartle* was expressed by the

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[8] The Restatement 2d Torts §653 states the elements of a claim for common law malicious prosecution as follows:

> a private person who initiates or procures the institution of criminal proceedings against another who is not guilty of the offense charged is subject to liability for malicious prosecution if (a) he initiates or procures the proceedings without probable cause and primarily for a purpose other than that of bringing an offender to justice and (b) the proceedings have terminated in favor of the accused.

In Illinois, the elements of common law malicious prosecution are (i) the commencement of a criminal proceeding, (ii) without probable cause, (iii) with malice, (iv) the termination of the proceedings in favor of the plaintiff and (v) damages. *Frye v. O'Neill*, 166 Ill.App.3d 963, 965 (4th Dist. 1988).

Fifth Circuit in *Wheeler v. Cosden Oil & Chemical Co.*, 734 F.2d 254 (5th Cir. 1984). There the court permitted a malicious prosecution, i.e., one without probable cause, to state a §1983 claim on the basis of this Court's statement in *U.S. v. Calandra*, 414 U.S. 338, 343 (1974), that probable cause was required to support a grand jury indictment. However, Judge Gee, writing for the court in *Wheeler, supra*, 734 F.2d at 259, acknowledged that he arrived at that conclusion, "[w]ith no great assurance" in light of this Court's language in *Gerstein v. Pugh*, 420 U.S. 103, 125 n.26 (1975), that the "probable cause determination [was] not a constitutional prerequisite to the charging decision. . . . "[9]

A mid-range approach is suggested by such as the Fourth Circuit's decision in *Goodwin v. Metts*, 885 F.2d 157, 163 (4th Cir. 1989). There the court permitted a malicious prosecution action under §1983 if the action of the state actors was "objectively unreasonable" as articulated in *Malley v. Briggs*, 475 U.S. 335 (1986). That approach was followed by the Second Circuit in *Golino v. New Haven*, 950 F.2d 864, 870-71 (2d Cir. 1991) and the Fifth Circuit in *Saunders v. English*, 950 F.2d 1152 (5th Cir. 1992).

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[9] Judge Gee assumed the *Gerstein* language referred to the judicial determination of probable cause as *Gerstein* required if the defendant was incarcerated. Other cases seeming to subscribe to the *Wheeler* approach include *White v. Frank*, 855 F.2d 956 (2d Cir. 1988); *Hand v. Gary*, 832 F.2d 1420 (5th Cir. 1988); *Strength v. Hubert*, 854 F.2d 421 (11th Cir. 1988); *Robinson v. Maruffi*, 895 F.2d 649 (10th Cir. 1989); and *Brummett v. Camble, supra*.

The court in *Goodwin v. Metts, supra*, 885 F.2d at 163, likened the pursuit of a prosecution to the application for an arrest warrant where " 'a reasonably well-trained officer in [his] position would have known that his affidavit failed to establish probable cause and that he should not have applied for the warrant,' " quoting *Malley v. Briggs, supra*, 475 U.S. at 345. See also *Jones v. City of Chicago*, 856 F.2d 985, 993 (7th Cir. 1988). The court in *Goodwin, supra*, 885 F.2d at 163, quoting *U.S. v. Marion*, 404 U.S. 307, 320 (1971), said,

> [l]ike an arrest, a prosecution is 'a public act that may seriously interfere with the defendant's liberty, whether he is free on bail or not, and that may disrupt his employment, drain his financial resources, curtail his associations, subject him to public obloquy, and create anxiety in him, his family and his friends.'

In that light, the court held, "whether a criminal defendant is incarcerated is not decisive in determining if he has suffered an abridgment of constitutional rights." *Id.*

An approach of a seemingly more restrictive yet indeterminate nature is represented by such cases as *Torres v. Superintendent of Police*, 893 F.2d 404, 408 (1st Cir. 1990). That line of cases seems to recognize a cause of action coextensive with the common law tort if the challenged conduct is "so egregious as to rise to the level of a constitutional violation. . . . " *Torres, supra*, 893 F.2d at 408-409. Similar approaches, which the *Torres* court called the "majority rule", have been followed in such cases as

Coogan v. City of Wixom, 820 F.2d 170, 174 (6th Cir. 1987); and *Dunn v. Tennessee*, 697 F.2d 121 (6th Cir. 1982).[10]

Before its decision in this case, the Seventh Circuit position was that "an action for malicious prosecution [could] be brought under §1983 if, acting under color of state law, the defendant has subjected the plaintiff to a deprivation of constitutional magnitude." *Hampton v. Hanrahan*, 600 F.2d 600, 630 (7th Cir. 1979). That view was repeated by an *en banc* Seventh Circuit in *Easter House v. Felder*, 910 F.2d 1387, 1407 (7th Cir. 1990). However, the Seventh Circuit never, until this case, advised what a "deprivation of constitutional magnitude" might be. But, it had said, contrary to such as *Lee v. Mihalich, supra*, and *Rose v. Bartle, supra*, that "the common law tort of malicious prosecution" is not a constitutional wrong remedied by 42 U.S.C. §1983. *Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985).

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[10] A variant of this line of cases recognizes malicious prosecution as a cause of action if a specific constitutional violation over and above the customary elements of the common law tort are alleged. That point was illustrated in *Usher v. City of Los Angeles*, 828 F.2d 556, 561-62 (9th Cir. 1987), and *Karim – Panahi v. L.A. Police Dept.*, 839 F.2d 621 (9th Cir. 1988), where the court said a §1983 action would lie if the prosecution was pursued with the intent to deprive one of equal protection of the laws. The court of appeals' opinion in this case might fall into this category.

This last, most restrictive line of decisions would also probably allow a §1983 cause of action if the police conduct "shocked the conscience". *Rochin v. California*, 342 U.S. 165, 172 (1952). That point was illustrated by the First Circuit's decision after *Torres, supra*, in *Smith v. Massachusetts Dept. of Corrections*, 936 F.2d 1390, 1402 (1st Cir. 1991).

The foregoing summary demonstrates that the lower courts are in disarray and in need of guidance on the extent to which, if any, a baseless prosecution, if objectively unreasonable in Fourth Amendment terms, might infringe liberty protected by the Due Process Clause. The court of appeals' resolution – that it does not unless accompanied by incarceration or loss of a protected status or other "palpable consequence" – presents a useful framework for analysis. This case is, therefore, well-suited to enable this Court to provide meaningful guidance.

B.

THE SEVENTH CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S PRECEDENTS GIVING CONSTITUTIONAL PROTECTION AGAINST OBJECTIVELY UNREASONABLE SEARCHES AND SEIZURES, ESTABLISHING THE DUE PROCESS REQUIREMENT OF PROOF BEYOND A REASONABLE DOUBT IN CRIMINAL CASES, AND DEFINING THE INTERESTS PROTECTED BY SPEEDY TRIAL GUARANTEE, ALL OF WHICH ESTABLISH THE LIBERTY SUBJECT TO CONSTITUTIONAL PROTECTION AGAINST OBJECTIVELY UNREASONABLE PROSECUTIONS.

Petitioner submits the decision below conflicts with the line of Fourth Amendment decisions beginning with *Franks v. Delaware*, 438 U.S. 154 (1977), through *U.S. v. Leon*, 468 U.S. 897 (1984), culminating in *Malley v. Briggs, supra*. Those decisions, together with the due process requirement of proof beyond a reasonable doubt in criminal cases, *In Re Winship*, 397 U.S. 358 (1970), and *Jackson v. Virginia*, 443 U.S. 307 (1979), and the interests protected

by the speedy trial guarantee, *Klopfer v. North Carolina*, 386 U.S. 213 (1967); *U.S. v. Marion, supra*; and *U.S. v. MacDonald*, 456 U.S. 1 (1982), provide the contours of the liberty subject to constitutional protection against objectively unreasonable prosecutions. That liberty consists of freedom from unnecessary and unreasonable risk of conviction on proof less than beyond a reasonable doubt and the resultant freedom from unnecessary "anxiety and concern accompanying public accusation." *Klopfer v. North Carolina, supra*, 386 U.S. at 222.

The Fourth Amendment probable cause standard operates "to safeguard citizens from rash and unreasonable interferences with privacy *and from unfounded charges of crime.*" *Brinegar v. U.S.*, 338 U.S. 160, 176 (1949) (emphasis supplied). It does that in several preliminary settings, e.g., before a warrant authorizing a search may issue, e.g., *Schneckloth v. Bustamonte*, 412 U.S. 218, 219 (1973); before a search without a warrant may take place, e.g., *Carroll v. U.S.*, 267 U.S. 132, 162 (1925); before an arrest warrant may issue, e.g., *Payton v. New York*, 445 U.S. 573 (1980); before an arrest without a warrant may be performed, e.g., *Draper v. U.S.*, 358 U.S. 307 (1959); and "as a prerequisite to detention" incident to the filing of charges, *Gerstein v. Pugh*, 420 U.S. 103, 126 (1975).

But, probable cause is a "practical, non-technical conception." *Brinegar, supra*, 338 U.S. at 176. It is a conception which "deal[s] with probabilities." *Id.* Consequently, "probable cause is a fluid concept – turning on the assessment of probabilities in particular factual contexts – not readily, or even usefully, reduced to a neat set of legal rules." *Illinois v. Gates*, 462 U.S. 213, 232 (1983). Therefore, the probable cause standard is flexible and is applied "to

give fair leeway for enforcing the law in the community's protection." *Brinegar, supra*, 338 U.S. at 176. As such, in enforcing the probable cause standard, "room must be allowed for mistakes [on the part of officers]." *Id.*

The essence of all definitions of probable cause "is a reasonable ground for belief of guilt." *Brinegar, supra*, 338 U.S. at 175. It exists where " 'the facts and circumstances within . . . officers[']knowledge and of which they ha[ve] reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed." *Brinegar, supra*, 338 U.S. at 175-76, quoting *Carroll v. U.S., supra*, 267 U.S. at 162 (1925).

Since the probable cause standard is a flexible one, this Court has "recognized that it is inevitable that law enforcement officials will in some cases reasonably but mistakenly conclude that probable cause is present. . . . " *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). In the criminal search context, such officials will not be made to suffer the exclusion of evidence seized mistakenly but reasonably without probable cause. *U.S. v. Leon, supra*, 468 U.S. at 914. And, such officials will be immune from damage actions under §1983 respecting either a search or an arrest mistakenly but reasonably effected without probable cause. *Malley v. Briggs, supra*; *Anderson v. Creighton, supra*.

But, when an officer proceeds where no reasonably competent officer could have believed probable cause existed, any evidence seized is subject to the exclusionary rule. *U.S. v. Leon, supra*, 468 U.S. at 926. And, an officer

who causes an arrest may be required to answer in damages. *Malley v. Briggs, supra,* 475 U.S. at 343-44. This objective reasonableness standard in the search and arrest contexts under *Leon* and *Malley* respectively thus merges with the standard under *Harlow v. Fitzgerald,* 457 U.S. 800 (1982), for invoking qualified immunity. *Malley, supra,* 475 U.S. at 341. Qualified immunity "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." *Id.* See also *Anderson v. Creighton, supra,* 483 U.S. at 641.[11]

However, the probable cause determination in the search, arrest, or detention after charge settings "is . . . only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct." *Gerstein v. Pugh, supra,* 420 U.S. at 125 n.27 (emphasis in original). After that first stage and after a person is arrested, "the question whether [the] . . . prosecution is unconstitutional passes

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[11] The objective unreasonableness of Oliver's prosecution of Albright is demonstrated by *Illinois v. Gates,* 462 U.S. 213, 232 (1983), where this Court recognized "tips" from informants as providing probable cause. This Court previously held those tips were of many varieties and "var[ied] greatly in their value and reliability." *Adams v. Williams,* 407 U.S. 143, 147 (1972). *Gates, supra* at 242, emphasized the importance of "the probative value of corroborative efforts of police officials . . . " in establishing probable cause. This Court relied on *Draper v. U.S.,* 358 U.S. 307 (1959), as "the classic case on the value of corroborative efforts of police officials." *Gates, supra* at 242.

In this case, Oliver was able to corroborate none of the information Moore gave him. The court of appeals evidently agreed Oliver's actions were objectively unreasonable, calling them "shocking" and "exceed[ing]" "[t]he limits of reasonable police conduct". App. 4a.

over from the Fourth Amendment to the Due Process Clause. . . . " *Jones v. City of Chicago,* 856 F.2d 985, 994 (7th Cir. 1988); *Villanova v. Abrams,* 972 F.2d 792, 797 (7th Cir. 1992). That statement follows from this Court's observation in *Mapp v. Ohio,* 367 U.S. 643, 657 (1961), that "[t]he philosophy of each amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence – the very least that together they assure in either sphere that no man is to be [deprived of constitutionally protected liberties]."

After the probable cause determinations and after the "Fourth Amendment falls away", *Villanova, supra,* 972 F.2d at 797, it is established that due process "protects [an] accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In Re Winship,* 397 U.S. 358, 364 (1970). That standard "is a prime instrument for reducing the risk of convictions resting on factual error." *Id.* at 363. As such, it "provides concrete substance for the presumption of innocence – that bedrock 'axiomatic and elementary' principle whose 'enforcement lies at the foundation of the administration of our criminal law.' " *Id.,* quoting *Coffin v. U.S.,* 156 U.S. 432, 453 (1895).

However, despite the reasonable doubt safeguard built into the criminal justice system, it is recognized that even "a properly instructed jury may . . . convict . . . when it can be said that no rational trier of fact could find guilt beyond a reasonable doubt. . . . " *Jackson v.*

Virginia, 443 U.S. 307, 317 (1979).[12] In a federal trial, a conviction thus secured must be reversed. *Id.* In a state trial, the Constitution would require vacation of such conviction. *Id.* at 318.

While the probable cause standard is flexible, *Brinegar, supra*, and may be subject to reasonable disagreement among reasonable officers, *Anderson v. Creighton, supra*, in all contexts, it " 'means *less* than evidence which would justify condemnation' or conviction. . . . " *Brinegar, supra*, 338 U.S. at 175, quoting *Locke v. U.S.*, 11 U.S. (7 Cranch) 339, 348 (1813) (emphasis supplied). Therefore, the evidence necessary to establish probable cause is always less than that necessary to establish proof beyond a reasonable doubt. *Id.*

As this Court noted in *Malley v. Briggs, supra*, 475 U.S. at 345-46, "ours is not an ideal system. . . . " Therefore, just as a properly instructed jury sometimes convicts on proof less than beyond a reasonable doubt, *Jackson v. Virginia, supra*, "it is possible that a magistrate, working under docket pressures, will fail to perform as a magistrate should." *Malley, supra*, at 346. When that happens, an objectively unreasonable prosecution will not be stopped at the warrant or preliminary hearing stages and an accused will face "unfounded charges of crime." *Brinegar, supra*, 368 U.S. at 176; *Malley, supra* at 346.[13] In that

[12] This is not an abstract concern. See for e.g., Rattner, *Convicted But Innocent*, 12 Law & Human Behavior 283 (1988), and studies cited therein.

[13] Petitioner does not seek to impose liability against Oliver on the basis of his testimony at the preliminary hearing. See *Briscoe v. LaHue*, 460 U.S. 325 (1983). That testimony was consistent with Oliver's initial decision to charge Petitioner and was thus the "natural consequence of [that] action[]" *Malley v. Briggs*, 475 U.S. 335, 344 n.7 (1986). See footnote 5, *supra*.

event, an officer's pursuit of a prosecution where no reasonably competent officer could have thought he had probable cause, has "created the unnecessary danger of an unlawful [conviction]." *Malley, supra* at 345.

When there is pursuit of an objectively unreasonable prosecution, the result, to be consistent with *Leon, supra*, and *Malley, supra*, must be the same as in those cases. To paraphrase *Malley, supra*, 475 U.S. at 344, "it would be incongruous to test police behavior by the 'objective reasonableness' standard in a suppression hearing" and in a §1983 damages action for false arrest or search "while exempting police conduct" recklessly pursuing a baseless prosecution "from any scrutiny whatsoever in a §1983 damages action." Going beyond the wrongful arrest involved in *Malley* to the wrongful prosecution involved in this case, the rationale of *Malley, supra*, 475 U.S. at 344 is convincing:

> in the case of the §1983 action, the likelihood is obviously greater than at the suppression hearing that the remedy is benefitting the victim of police misconduct one would think most deserving of a remedy – the person who in fact has done no wrong, and has been [prosecuted] for no reason, or a bad reason.

There are additional constitutionally significant consequences which result from subjecting someone to the unnecessary and unreasonable risk of conviction on proof less than beyond a reasonable doubt. This Court has

recognized that unlike the reputational damage caused by the defamatory publication in *Paul v. Davis, supra*, a criminal prosecution involves "the full machinery of the state in scrutinizing any given individual." *Young v. U.S.*, 481 U.S. 787, 814 (1987) (opinion of Brennan, J.). That is because

> [p]rosecutors 'have available a terrible array of coercive methods to obtain information,' such as 'police investigation and interrogation, warrants, informers and agents whose activities are immunized, authorized wire tapping, civil investigatory demands, [and] enhanced subpoena power'.

Id. at 811, quoting C. Wolfram, *Modern Legal Ethics*, 460 (1986).

Accordingly, "[e]ven if a defendant is ultimately acquitted, forced immersion in criminal investigation and adjudication is a wrenching disruption of everyday life." *Young v. U.S., supra*, 481 U.S. at 814. Similarly, the Seventh Circuit has observed that "[a]ccusation and trial are wrenching experiences, especially for the innocent." *Buckley v. Fitzsimmons*, 919 F.2d 1230, 1233, vacated ___ U.S. ___, 112 U.S. 40 (1991), affirmed on remand, 952 F.2d 965 (7th Cir. 1992), cert. granted, No. 91-7849, ___ U.S. ___ (Oct. 5, 1992). Therefore, a criminal prosecution subjects a person to a qualitatively different set of forces than those to which the victim of a defamatory utterance is subjected.

This Court has recognized as a " 'major evil' against which the Speedy Trial Clause is directed" the "anxiety and concern accompanying public accusation". *Doggett v. U.S.*, 505 U.S. ___, 120 L.Ed.2d 520, 533 (1992) (Thomas, J.

dissenting). See also *Klopfer v. North Carolina, supra*, 386 U.S. at 222. The liberties protected by the speedy trial guarantee are "quite apart from actual or possible prejudice to an accused's defense." *U.S. v. Marion*, 404 U.S. 307, 320 (1971). Rather, " 'the speedy trial guarantee is designed [among other things] . . . to reduce the lesser, but nevertheless substantial, impairment of liberty imposed on an accused while released on bail, and to shorten the disruption of life caused . . . by the presence of unresolved criminal charges.' " *U.S. v. MacDonald*, 456 U.S. 1, 8 (1982).[14]

In *Barker v. Wingo, supra*, 407 U.S. at 530, this Court held that "[u]ntil there is some delay which is presumptively prejudicial", the interests protected by the Speedy Trial Clause were not implicated. But, as implied by the Fourth Circuit in *Goodwin v. Metts, supra*, 885 F.2d at 163, presumptive prejudice similar to that caused by delay in the speedy trial sense occurs at the point of the pursuit of an objectively unreasonable prosecution. That presumptive prejudice occurs because the accused has been unreasonably placed at risk of a conviction on proof less than beyond a reasonable doubt, a violation of due process. *Brinegar, supra*, 338 U.S. at 175; *Jackson v. Virginia, supra*.

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[14] Petitioner argued below that his freedom of interstate movement was restricted by the bond conditions incident to his prosecution. See *Shapiro v. Thompson*, 394 U.S. 618, 629 (1969); *U.S. v. Guest*, 383 U.S. 745, 757-58 (1966); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 257 (1974). Petitioner adheres to that position on certiorari. However, that restriction is better understood as an aspect of the more generalized liberty argued herein.

That risk of conviction on proof less than beyond a reasonable doubt resulting from the pursuit of an objectively unreasonable prosecution necessarily causes the " . . . emotional stress that can be presumed to result in the ordinary person from uncertainties in the prospect of facing public trial. . . . " *Strunk v. U.S.*, 412 U.S. 434, 439 (1973). The Due Process Clause, therefore, protects against the unreasonable risk of conviction on proof less than beyond a reasonable doubt and its necessary effects, "anxiety and concern accompanying public accusation", *Klopfer, supra*, 386 U.S. at 222, both resulting from the objectively unreasonable "presence of unresolved criminal charges". *U.S. v. MacDonald, supra*, 456 U.S. at 8.

The foregoing approach is faithful to this Court's precedents that the freedoms enshrined in the Bill of Rights are complementary to each other. *Mapp v. Ohio, supra*, 367 U.S. at 357. It is faithful to the holding of *DeShaney v. Winnebago County*, 489 U.S. 189, 195 (1989), that the Due Process Clause serves "as a limitation on the state's power to act, not as a guarantee of certain minimal levels of safety and security."[15] Petitioner's approach is consistent with the decision last term in *Collins v. Harker Heights*, 503 U.S. ___,117 L.Ed.2d 261, 269 (1992), holding that §1983 provides an "effective remedy against . . . abuses of state power that violate federal law . . . ", rather than an imposition of "federal duties that are

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[15] See also Currie, *Positive and Negative Constitutional Rights*, 53 U.Chi.L.Rev. 864, 873-74 (1985), arguing that the liberties set forth in Sixth Amendment, including the right to speedy trial state "what constitute the process due when the state [seeks] . . . to deprive the individual of his life, liberty or property by means of the criminal law."

analogous to those traditionally imposed by state tort law", *Id.*, at 275. Cf. *Baker v. McCollan*, 443 U.S. 137, 146 (1979); *Paul v. Davis, supra*, 424 U.S. 693, 701 (1976); *Daniels v. Williams*, 474 U.S. 327, 331 (1986); and *Davidson v. Cannon*, 474 U.S. 344, 348 (1986).[16]

More than anything government does to the individual, except actual incarceration or execution, public prosecution is the most intrusive and violative of the right "to be let alone – the most comprehensive of rights and the right most valued by civilized men". *Olmstead v. U.S.*, 277 U.S. 438, 478 (Brandeis, J., dissenting) (1928). Public prosecution impinges upon the right to be free from public scrutiny. It extinguishes the right to be free from forced display in a public forum under circumstances of anguished apprehension and embarrassment. It extinguishes the right to be free from apprehension about one's legal future and derivatively economic, social, familial, educational, occupational, and marital futures. *Strunk v. U.S. supra; U.S. v. Marion, supra; Klopfer v. North Carolina, supra; Young v. U.S., supra.*[17]

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[16] Petitioner, therefore, does not seek to "constitutionalize" common law malicious prosecution. See n.8 *supra*. Petitioner probably does not have a viable common law malicious prosecution action as an Illinois statute, *Ill.Rev.Stat.* Ch. 85 § 8-101, creates a one year statute of limitation for advancing various tort claims, including malicious prosecution, against municipal employees. See App. H, 84a, *infra*.

[17] Liability for pursuit of an objectively unreasonable prosecution would lie only in a narrow class of cases where the information the officer provides the prosecutor upon which the prosecutor acts is information "no officer of reasonable competence would have [submitted to the prosecutor]. . . . " *Malley v. Briggs, supra*, 475 U.S. at 346 n.9. In that situation, the requisite

Those intrusive effects of a prosecution are permeating and pervasive in relation to this Court's characterization in *Paul v. Davis, supra*, 424 U.S. at 713, of plaintiff's privacy claim in that case:

> constitutional protection against the disclosure of the fact of his arrest on a shoplifting charge. His claim is based, not upon any challenge to the state's ability to restrict his freedom of action in a sphere contended to be 'private', but instead on a claim that the state may not publicize a record of an official act such as an arrest.

The pursuit of a prosecution implicates interests protected by the Constitution. *Brinegar, supra; Jackson v. Virginia, supra; Klopfer v. North Carolina, supra.* If the prosecution is objectively unreasonable, it is, *ipso facto*, an abuse of governmental power in Fourth, Sixth and Fourteenth Amendment terms as it would be "at best a waste of judicial resources"; "at worst . . . [a cause of] injur[y] [to] the innocent. . . . " *Malley v. Briggs, supra*, 475 U.S. at 343-44; *Jackson v. Virginia, supra; Klopfer v. North Carolina, supra.* It is the employment of that power as an "instrument of oppression". *Malley, supra; Davidson v. Cannon, supra* at 348; *Daniels v. Williams, supra* at 331; *DeShaney,*

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causation would exist because, "§1983 'should be read against the background of tort liability that makes a man responsible for the natural consequences of his actions.' " *Malley v. Briggs, supra*, 475 U.S. at 344 n. 7, quoting *Monroe v. Pape*, 365 U.S. 167, 187 (1961). Accordingly, "since the common law recognized the causal link between the submission of a complaint and an ensuing [prosecution], [this Court reads] § 1983 as recognizing the same causal link." *Malley, supra* at 344 n.7; *White v. Frank*, 855 F.2d 956, 959 and n.2 (2nd Cir. 1988).

supra, 489 U.S. at 196.[18] Accordingly, an objectively unreasonable prosecution should be recognized as actionable under §1983.

C.

THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN SETTLED BY THIS COURT, IS LIKELY TO RECUR, AND, THEREFORE, SHOULD BE SETTLED BY THIS COURT.

The observations, quoted above, of Justice White, of Judge Jones and of Judge Posner demonstrate that the question presented in this case is one which is unsatisfactorily festering in the Circuits. The frequency with which the issue has been presented indicates that it will recur

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[18] An objectively unreasonable prosecution is certainly as abusive of power as other types of conduct under color of state law recognized as actionable under §1983 by the Circuits: *Freeman v. Ferguson*, 911 F.2d 52, 54 (8th Cir. 1990) (cause of action where violence to decedents " . . . was . . . the result of an affirmative act by a state actor to interfere with the protective services which would have otherwise been available . . . [thereby] increasing the vulnerability of decedents . . . "); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989) (§1983 cause of action where a woman traveling in car impounded by state trooper was left to find her way home and was raped); *Cornelius v. Highland Lake*, 880 F.2d 348 (11th Cir. 1989) (§1983 plaintiff not subject to summary judgment where she was abducted and held hostage for three days by inmate laborers who escaped from a state supervised work project); *Gregory v. City of Rogers*, 921 F.2d 750, 752-57 (8th Cir. 1990) (cause of action where police arrested and detained sober designated driver leaving intoxicated passengers to fend for themselves resulting in accident and injury).

with frequency.[19] When it does, unless this Court has provided guidance, it will continue to spawn a diversity of conflicting judicial approaches. Whether and, if so, the extent to which victims of objectively unreasonable prosecutions have a §1983 cause of action will depend upon geography. That is an inappropriate criterion. The issue presented in this Petition is, therefore, ripe for and requires this Court's resolution.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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[19] Another case, *City of Manhattan Beach v. Buckey*, No. 92-560, is now before this Court on Petition for Certiorari raising *inter alia* the question "whether malicious prosecution constitutes a violation of due process for purpose of a § 1983 cause of action even where all procedural requirements of due process have been met". The Petition in *Buckey*, seeking review of the Ninth Circuit's judgment in *Buckey v. County of Los Angeles*, 957 F.2d 652 (9th Cir. 1992), amended 968 F.2d 791 (9th Cir. 1992), covers some of the same ground presented in this Petition. Cf. *Cerbone v. Conway*, 479 U.S. 84 (1986) (writ of certiorari dismissed as improvidently granted).

APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 91-3746
KEVIN ALBRIGHT,

Plaintiff-Appellant,

v.

ROGER OLIVER, individually and in his official capacity as a police detective with the City if Macomb, Illinois, and CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Defendants-Appellees.

Appeal from the United States District Court for the Central District of Illinois, Peoria Division.
*No. 90 C 1221 – **Michael M. Mihm,** Chief Judge.*

ARGUED MAY 20, 1992 – DECIDED SEPTEMBER 14, 1992

Before BAUER, *Chief Judge*, POSNER, *Circuit Judge*, and GIBSON, *Senior Circuit Judge.**

POSNER, Circuit Judge. The district judge granted the defendants' motion to dismiss the complaint in this constitutional tort case (brought under 42 U.S.C. § 1983) for failure to state a claim, so we take the facts to be as

* Hon. Floyd R. Gibson of the Eighth Circuit, sitting by designation.

alleged in the complaint, without of course vouching for their truth. The plaintiff is Kevin Albright. The defendants are Roger Oliver, an experienced police detective employed by the City of Macomb, Illinois, the home of Western Illinois University; and the City itself. In March 1987 Oliver hired a cocaine addict, Veda Moore, as an informant. She had come to him seeking protection from a drug dealer who was threatening her because she owed him money. Oliver insisted that she work for him as an undercover informant, in exchange for which he promised her his protection and some pay. Her job for Oliver was to buy cocaine and report the sellers to him. She used the money that he paid her for this information to buy cocaine for her own consumption.

In June she reported having bought cocaine from John Albright, Jr. at a hotel room in Macomb. She turned over the "cocaine" to Oliver; it turned out to be baking soda. Without further investigation, Oliver testified about the transaction before a state grand jury, which returned an indictment against John Albright, Jr. for sale of a "look alike" (alike to an illegal drug, that is) substance in violation of Ill. Rev. Stat. ch. 56½, ¶ 1404(b). Oliver then went to John Albright, Jr.'s home to arrest him, but found that Albright was an elderly, respectable, inoffensive gentleman unlikely to have committed the offense of which Veda Moore had accused him. But in response to Oliver's question did Albright have any sons Albright told him that maybe Oliver was looking for his son John David Albright. So Oliver altered the name on the arrest warrant to John David Albright and went to arrest him – only to discover that he had been in Chicago at the time of the alleged offense.

There was another son, Kevin Albright, a senior at Western Illinois University. Oliver called Moore and asked her whether the man from whom she had bought the baking soda might be Kevin Albright. She said it was he all right. A criminal information was issued charging Kevin Albright with the offense, followed (on October 16, 1987) by an arrest warrant. Learning of the warrant, Kevin Albright turned himself in, acknowledging to Oliver that he had been in Macomb on the date of the alleged offense but denying any involvement in drug trafficking. He was booked and required to post bond; one (mandatory) condition of bond was that he not leave the state without the court's permission. Ill. Rev. Stat. ch. 38 ¶ 110-10(a)(3). At the preliminary hearing, held on January 5, 1988, Oliver testified about Veda Moore's information without however revealing his initial efforts against the other two Albrights, and the judge found probable cause to make Kevin Albright stand trial. But on June 27, before the trial could be held, the circuit court dismissed the information against Kevin Albright on the ground that it failed to state an offense under Illinois law. (We do not know why not; we have not been able to find a copy of the decision.) The prosecution had received media coverage. And Albright had missed a job interview in St. Louis – he says because of the prohibition against his leaving the state, although he did not request the court's permission to leave, as he could have done under the terms of the bond.

The present suit was brought one day short of two years after the dismissal of the prosecution. The complaint states a plausible claim for false arrest. It is true that Kevin Albright was not arrested in the conventional

sense – he turned himself in. But it is enough that he was booked; that was a seizure of his person within the meaning of the Fourth Amendment. *Voytko v. Ramada Inn of Atlantic City*, 445 F. Supp. 315, 320, 324 (D.N.J. 1978). And probably the "arrest" lacked probable cause. Detective Oliver made no effort to corroborate Veda Moore's unsubstantiated accusation. A heap of baking soda was no corroboration. Her initial misidentification of the seller cast grave doubt on the accuracy of her information. And this was part of a pattern: of fifty persons she reported to Oliver as trafficking in drugs, none was successfully prosecuted for any crime. In the case of "Albright," Oliver should have suspected that Moore had bought cocaine either from she knew not whom or from someone she was afraid to snitch on (remember that she had gone to work for Oliver in the first place because she was being threatened by a man to whom she owed money for previous purchases of cocaine), that she had consumed it and replaced it with baking soda, and that she had then picked a name from the phone book at random. The fact that she used her informant's reward to buy cocaine makes this hypothesis all the more plausible. An arrest is a serious business. To arrest a person on the scanty grounds that are alleged to be all that Oliver had to go on is shocking. The limits of reasonable police conduct, illistrated by our recent decision in *Davis v. Owens*, No. 91-2673 (7th Cir. Aug. 26, 1992), may well have been exceeded here – always assuming that the facts alleged in the complaint are true.

But Kevin Albright filed his suit more than two years after his arrest, so his constitutional claim of false arrest was barred by the statute of limitations. *Wilson v. Garcia*,

471 U.S. 261, 276 (1985); Ill. Rev. Stat. 1991, ch. 110, § 13-202. He has therefore had to base this suit on the events after the arrest, that is, on the prosecution itself, which ended on June 27, 1988, when the charges against him were dropped, and which he characterizes as malicious. He contends that malicious prosecution is, or at least in particular circumstances can be, a constitutional tort.

As noted in *Brummett v. Camble*, 946 F.2d 1178, 1180 n. 2 (5th Cir. 1991), this is a question on which there is an embarrassing diversity of judicial opinion. The Supreme Court has not opined on the question, but its decision in *Paul v. Davis*, 424 U.S. 693 (1976), holding that defamation by a public officer is not a constitutional tort, provides a clue to the answer that the Court is likely to give if it ever agrees to review a case that presents the question. The Court could have equated reputation to property and held that a tortious injury to reputation is analytically the same as a conversion of property, which is actionable in a civil rights suit if done intentionally by a state officer. *Kimbrough v. O'Neil*, 545 F.2d 1059 (7th Cir. 1976) (en banc); *Augustine v. Doe*, 740 F.2d 322, 327 (5th Cir. 1984); *Bayron v. Trudeau*, 702 F.2d 43, 45 and n. 2 (2d Cir. 1983). It declined to make this equation. It did not want to draw the whole body of public-officer state law into the federal courts in the name of civil rights. Malicious prosecution, whether civil or criminal, resembles defamation. It is a deliberate accusation of wrongdoing calculated to embarrass the defendant, disrupt his activities, and put him to the expense of defending himself. Since a malicious prosecution is by definition groundless, it does not impose punishment costs, not usually anyway. In the end the

defendant is exonerated, though the end may come after punishment had been imposed or commenced, for example if the prosecution had been founded on forged documents not exposed till after the defendant had been convicted and imprisoned, as was alleged to be the case in *King v. Goldsmith*, 897 F.2d 885 (7th Cir. 1990). The medley of harms that a malicious prosecution inflicts when, as in this case, the defendant is exonerated before any punishment is imposed – indeed before he is even put on trial – is similar to that inflicted by defamation, which by impairing a person's reputation not only embarrasses and even outrages him but also undermines his ability to make favorable transactions, whether business or personal, thereby subjecting him to costs pecuniary or nonpecuniary or both. It also puts him to costs pecuniary or nonpecuniary or both. It also puts him to the expense of bringing a suit for defamation to recover his good name. If the injuries that defamation imposes do not constitute a deprivation of liberty or property within the meaning of the due process clause, then neither do the injuries that malicious prosecution imposes.

But like defamation, malicious prosecution can be a component of a constitutional tort. Defamation accompanying a discharge from employment can make it impossible for a person to obtain equivalent employment elsewhere, thus depriving him of liberty of occupation, one of the liberties protected by the due process clause. *Hampton v. Mow Sun Wong*, 426 U.S. 88, 102 (1976); *Colaizzi v. Walker*, 812 F.2d 304, 307 (7th Cir. 1987); *Lawson v. Sheriff of Tippecanoe County*, 725 F.2d 1136 (7th Cir. 1984). In this example the concept of liberty is used to make

constitutional tort liability for defamation by public officers narrower than common law liability. The same analytical process is available to deal with the parallel case of malicious prosecution. Malicious prosecution can result in a person's being thrown into jail to await trial, and incarceration is of course no less a deprivation of liberty within the meaning of the due process clause than exclusion from an occupation. *United States v. Salerno*, 481 U.S. 739, 746 (1987); *Addington v. Texas*, 441 U.S. 418, 425 (1979); *Villanova v. Abrams*, No. 89-3146, slip op. at 7-8 (Aug. 13, 1992). But Kevin Albright, though a recipient of unfavorable media publicity, does not contend that he is either unemployable as a result of his prosecution or that he was put in jail or even forced to stand trial. And he does not argue that being required to appear for a probable cause hearing is the equivalent of incarceration.

He was, it is true, "confined" to Illinois; and if Denmark was a dungeon to Hamlet (as the latter claimed), we suppose Illinois could be a prison to Kevin Albright. The tort of false imprisonment does not require close confinement. *Robinson & Co. v. Green*, 148 Ala. 434, 43 So. 797 (1906); *Restatement (Second) of Torts* § 36, comment b (1965). The "prison" could indeed be as large as an entire state. *Id.*, § 36, illustration 7. But constitutional torts do not follow the exact contours of their common law counterparts. The element of confinement was further attenuated here by the fact that Albright could leave Illinois if he obtained leave of court. As he did not feel sufficiently restive, notwithstanding the possibility of a job interview across the state line in St. Louis, to request that leave, we do not think he was "confined" to the point of being deprived of constitutional liberty. If you close a person in

the room but the person has a key (and knows it), you have not committed false imprisonment. *Lopez v. Winchell's Donut House*, 126 Ill. App. 3d 46, 466 N.E.2d 1309 (1984); Restatement, *supra*, § 36(2), and comment a and illustration 1. *A fortiori* you have not deprived him of his constitutional liberty. The analogy is not exact, but suppose you told a person that you had locked the door but would open it as soon as he wanted to leave, provided he asked for it politely – and he never asked, or made any motion to leave. Would *that* be false imprisonment? Who knows? But it would not be a sufficient deprivation of liberty to actuate constitutional remedies. Quite apart from *Paul v. Davis*, the courts have declined to equate every infringement of an interest protected at common law to a deprivation of a constitutionally protected liberty. *Hudson v. McMillian*, 112 S. Ct. 995, 1000 (1992); *Cameron v. Internal Revenue Service*, 773 F.2d 126, 129 (7th Cir. 1985); *Davis v. Forrest*, 768 F.2d 257, 258 (8th Cir. 1985); *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d Cir. 1973) (Friendly, J.).

In cases such as these the concept of constitutional "liberty" is used as a gatekeeper to limit access to the federal courts by persons complaining of the pettier sort of official outrage. Liberty so conceived has a qualitative as well as a quantitative dimension. The State of Illinois could not impose a criminal sentence on Albright without according him due process of law, even if the sentence were merely that he remain in Illinois for a time unless he got a judge's permission to leave. But a similarly modest infringement of liberty is not actionable when, being merely a by-product or some less ominous form of public coercion than the imposition of criminal punishment, it is

farther from the core of constitutionally protected liberty. We do not place malicious prosecution in the class of trifling infringements of the right to be free from oppression by public officers; but in the absence of incarceration or other palpable consequences we do not think it should be actionable as a constitutional wrong. In a case such as this, where the prosecution collapses before trial, just as in the garden-variety public officer defamation case that does not result in exclusion from an occupation, state tort remedies should be adequate and the heavy weaponry of constitutional litigation can be left at rest. The multiplication of remedies for identical wrongs, while gratifying for plaintiffs and their lawyers, is not always in the best interest of the legal system or the nation.

Albright's energetic and tenacious counsel seeks to escape the conclusion that malicious prosecution is not actionable as a constitutional tort by pointing out that the Supreme Court has recognized a constitutional right to travel of which, he argues, the conditions in the bond deprived his client, E.g., *Kent v. Dulles*, 357 U.S. 116, 125 (1958); *Memorial Hospital v. Maricopa County*, 415 U.S. 250, 254 (1974). He does not, of course, suggest that courts which impose travel restrictions on persons awaiting trial for criminal offenses, or which jail them pending trial because they can't make bail or are regarded as a flight risk or a menace to the community, are engaged in wholesale violations of the right. *United States v. Lockett*, 526 F.2d 1110, 1112 (7th Cir. 1975). As a flight risk is the most eager of travelers, such a proposition would be extravagant even by the elastic standards of constitutional argumentation. The argument rather is that detective Oliver caused Albright to lose his freedom of travel by setting

the prosecution in motion without (whatever the judge at the preliminary hearing said – he wasn't given a full picture) probable cause to believe that Albright had actually committed a drug offense.

If Oliver had been trying to confine Albright to Illinois, Albright might have an argument based on cases such as *Kent v. Dulles* that involve the denial of passports to Americans wanting to travel abroad. It would not be a strong argument. Not because *Regan v. Wald*, 468 U.S. 222, 240-42 (1984), confines the passport cases to First Amendment situations, where a passport is denied to persons on the basis of their beliefs; for *Regan* still requires that *some* justification be shown for limiting the right to travel, conceived of as a right conferred by the due process clause, even if the First Amendment is not involved. There was no justification here, if the prosecution was malicious. But we do not understand Albright to be arguing that Oliver intended to curtail his right to travel, though this was a foreseeable incident of the prosecution. More important, it is not clear that the right was materially curtailed, given the terms of the bond.

We said earlier that the due process phase of the case would be different if Albright had been incarcerated, and he would have been had he not posted bond – so should the cost of the bond ($350 – 10 percent of the face amount of the bond) be considered a substitute deprivation? If jail deprives a defendant of liberty, shouldn't money in lieu of jail deprive him of property? Well, but bond money is refundable if the defendant does not violate the terms of the bond. Had Albright posted the full bond ($3500) he would have gotten it back, but instead he chose to pay a nonrefundable fee of $350 in lieu of bond. Such a fee

should be treated no differently from attorney's fees. It was an incidental expense of a lawsuit that terminated in his favor. Obviously the expense of the fees that the plaintiff in a defamation case incurs is not a deprivation of property that enables him to bring suit against the public officer who defamed him. That would undo *Paul v. Davis*. No more should it be the shoehorn that squeezes malicious prosecution into the due process clause. *Easter House v. Felder*, 910 F.2d 1387, 1407 (7th Cir. 1890) (en banc).

Albright next argues that the prosecution denied him the equal protection of the laws. He does not claim to have been singled out for prosecution because he was black or a member of some other minority, but he points out that a class with only one member can still complain of discrimination against his tiny class. *United States v. Falk*, 479 F.2d 616, 619 (7th Cir. 1973) (en banc); *Falls v. Town of Dyer*, 875 F.2d 146 F.2d 146 (7th Cir. 1989). Indeed, one might suppose that the smaller the class, the less able it would be to protect itself in the political arena, and therefore the greater the danger that it might be singled out for oppression. But you must be singled out because of your membership in the class, and not just be the random victim of governmental incompetence. To close the question left open in *Wroblewski v. City of Washburn*, 965 F.2d 452, 459 (7th Cir. 1992), we hold that "the state's act of singling out an individual for differential treatment" does *not* "itself create the class." That would make every selective prosecution, and indeed every arbitrary act of government, a violation of the Constitution.

Even if, as Albright suggests, the class of innocent persons could be regarded as a protected group for purposes of the equal protection clause (an implausible suggestion, for while we are not a law-abiding society, the innocent are not yet an oppressed minority among us), no one supposes that Oliver went after Albright *because* Albright was innocent. At worst, Oliver failed to discriminate carefully between the probably guilty and the probably innocent. It is not suggested that he has a perverse desire to punish the innocent and leave the guilty alone. Or that he has it in for anyone named Albright.

There are some other issues and arguments but they need not be discussed. The case was properly dismissed.

AFFIRMED.

A true Copy:
Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

KEVIN ALBRIGHT, Plaintiff, v. ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation, and THE CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation, Defendants.	)	Case No. 90-1221

ORDER

(Filed Sep 30 1991)

Before the Court is the Defendants' Motion to Dismiss (#23) and the Plaintiff's Motion to Amend the Second Amended Complaint (#27). For the reasons set forth below, the Defendants' Motion to Dismiss is granted in part and denied in part, and the Plaintiff's Motion to Amend is granted.

Background

The Complaint alleges the following facts, which this Court assumes are true in the context of a Motion to Dismiss. The Defendant Roger Oliver ("Oliver") has been a detective in the police department of the Defendant City of Macomb, Illinois ("City") for the past two

decades. In March of 1987, Oliver hired a woman named Veda Moore as a paid informant to assist in undercover drug operations. Moore had a history of drug usage herself.

On June 17, 1987, Moore reported to Oliver that she had purchased cocaine from a man named John Albright, Jr., and that the transaction had taken place at a hotel in Macomb. Oliver submitted the substance which Moore had purchased on that occasion for lab analysis and learned that it was baking powder, not cocaine. Nonetheless, on September 10, 1987, Oliver testified before a McDonough County Grand Jury, and the Grand Jury returned an indictment against John Albright, Jr. for the sale of a "look alike" substance. Oliver then went to the home of John Albright, Jr. in Macomb to execute the arrest warrant, only to learn the John Albright, Jr. was a man in his sixties and not likely to be the person who sold the substance to Veda Moore on June 17. Mr. Albright suggested to Oliver that perhaps he was looking for John David Albright, one of his sons.

Oliver altered the arrest warrant to read John David Albright instead of John Albright, Jr. However, John David Albright was not the right man either. He had been living in Chicago for the previous year, including the day on which Moore purchased the baking powder. John David Albright somehow learned that an arrest warrant had been issued against him, so he traveled to Macomb to clear things up. He explained to Oliver that he had been living and working in Chicago and thus could not be the one Oliver was looking for. Oliver then surmised that his true target was actually the Plaintiff Kevin Albright, John David Albright's brother. Oliver called Veda Moore and

asked her if the person from whom she purchased the baking powder could have been Kevin Albright. Moore confirmed that it was actually Kevin Albright.

On October 16, 1987, a criminal information was then issued against Kevin Albright for the sale of a "look alike" substance, and on October 19, 1987, an arrest warrant was issued for him.

Kevin Albright turned himself in and on January 5, 1988, a preliminary hearing was held. The circuit court found probable cause and bound Kevin Albright (herinafter[sic] "Albright") over for trial. However, on June 27, 1988, the circuit court dismissed the information against Kevin Albright on the grounds that it did not state an offense under Illinois law.

Just one day shy of two years later, Albright filed this civil action against the City and Oliver, alleging that they had violated his constitutional rights and committed various common law torts by bringing a baseless prosecution against him. Count I is a §1983 malicious prosecution claim against the City and Oliver in his official capacity. Count II is a §1983 malicious prosecution claim against Oliver in his individual capacity. Count III is a common law malicious prosecution claim against Oliver. Finally, Count IV is a common law false light invasion of privacy claim against Oliver.

Oliver and the City now move to dismiss all claims against them. They argue that Albright's §1983 claims were untimely filed, that those claims fail to state a proper claim upon which relief can be granted, and further that Oliver possesses qualified immunity from those claims. The Defendants also argue that the common law

false light invasion of privacy claim is barred by the statute of limitations. Finally, the Defendants argue that, if the federal claims are dismissed, Count III should be dismissed for lack of subject matter jurisdiction. The Magistrate considered the Motion to Dismiss and recommended that Counts I, II, and IV be dismissed as time-barred, but that Count III should remain because jurisdiction could be premised upon diversity. Both sides have filed objections to the Magistrate's recommendation.

DISCUSSION

I. Statute of Limitations

The Magistrate recommended that Count IV be dismissed as time-barred, given that the applicable statute of limitations for this action is one year under Ill.Rev.Stat. ch. 110, 13-201. In his objection to the Magistrate's recommendation, Albright apparently concedes that Count IV is time-barred because he does not contest the finding that the statute of limitations for this claim is one year or that his cause of action accrued more than one year before he filed suit. Accordingly, this Court adopts the Magistrate's recommendation on this point and hereby dismisses Count IV.

The Magistrate also suggested that Counts I and II, the §1983 malicious prosecution claims, were time-barred. The Magistrate noted that the statute of limitations in Illinois for §1983 claims is two years, see *Kalimara v. Illinois Department of Corrections*, 879 F.2d 279 (7th Cir. 1989), and found that all of the events about which Albright complained occurred more than two years before he filed suit on June 26, 1990. The only event which

occurred during the two years preceding this date was the Illinois circuit court's dismissal of the criminal charges against Albright. The Magistrate found that Albright's cause of action accrued before this date and this his §1983 claims were therefore time-barred. Albright objects to this finding. The question then is when does a §1983 malicious prosecution claim accrue?

This Court recently had an opportunity to address this issue in *Davis v. Union National Bank, et al*, Case No. 90-1067 (C.D. Ill., July 9, 1991). In that case, this Court first noted that the Seventh Circuit, while clearly holding that §1983 malicious prosecution claims were viable provided that they alleged constitutional deprivations, has not indicated when such causes of action accrued for purposes of the statute of limitations. In the absence of Seventh Circuit authority, this Court turned to other jurisdictions for guidance and concluded that a §1983 malicious prosecution claim accrues when the prosecution terminates in favor of the defendant. *See Davis*, slip op. at pp. 5-7; *Rose v. Bartle*, 871 F.2d 331, 348-49 (3rd Cir. 1989); *Robinson v. Maruffi*, 895 F.2d 649, 654-55 (10th Cir. 1990). The *Davis* case is currently on appeal to the Seventh Circuit, and perhaps that Court will find otherwise. Until such time, however, this Court's view regarding the accrual date for §1983 malicious prosecution claims remains the same, and Albright's June 26, 1990 filing was timely given that his cause of action accrued on June 27, 1988. Accordingly, this Court rejects the Magistrate's recommendation on this point and declines to dismiss Counts I and II on the basis that they were untimely filed.

II. Failure to State a Proper Claim

Because he found that Albright's §1983 claims were untimely filed, the Magistrate did not address the issue, raised by Defendants in their Motion to Dismiss, of whether Albright's civil rights counts failed to state a proper claim for relief. This Court now finds that they do fail to state a valid claim and that they should therefore be dismissed.

Counts I and II each state §1983 malicious prosecution claims – one is directed against the City and Oliver in his official capacity and the other is directly solely against Oliver in his individual capacity. While the law may vary in other jurisdictions, in this circuit the law is that a §1983 malicious prosecution claim is cognizable, provided that the Plaintiff alleges deprivations of a constitutional magnitude. *Easterhouse v. Felder*, 910 F.2d 1387, 1407 (7th Cir. 1990); *Hampton v. Hanrahan*, 600 F.2d 600, 630 (7th Cir. 1979). However, the common law tort of malicious prosecution is itself insufficient to create a civil rights claim and so a §1984 malicious prosecution claim must do more than allege the elements of a common law malicious prosecution action. *Friedman v. Village of Skokie*, 763 F.2d 236, 239 (7th Cir. 1985). Albright does not argue that the law is otherwise.

An allegation that a criminal defendant was charged without a prior determination of probable cause will not create a §1983 malicious prosecution claim, because there is no constitutional guarantee to such a finding prior to being criminally charged. *See Gerstein v. Pugh*, 420 U.S. 103, 125 n. 26 (1975). This is why merely alleging a common law malicious prosecution claim, which includes

as an element that the defendant was charged without probable cause (*see Frye v. O'Neill*, 166 Ill.App.3d 963, 975 (4th Cir. 1988)) is insufficient to state a §1983 malicious prosecution claim. *See Friedman*, 763 F.2d at 239. Albright does suggest that the law should be, and perhaps is, otherwise. *See* Plaintiff's Response to Defendants' Motion to Dismiss at p. 5, n. 4. This Court does not agree. A §1983 malicious prosecution claim must do more than allege that the plaintiff was charged in a criminal case without probable cause. Thus, Albright's allegations that Oliver investigated him and caused him to be charged while knowing that there was no probable cause to believe he had committed a crime, while adequate to support a common law malicious prosecution claim, do not support his §1983 malicious prosecution claims. Albright must point to some other distinct constitutional deprivation to maintain these counts.

In response to this challenge, Albright asserts three constitutional rights which suffered under the Defendants' actions. First on the list is his right to interstate travel. Albright asserts that as a result of the criminal charge against him, he was placed on bond with restrictions on his ability to travel out of state -- he would first have to seek permission of the court. Albright cites Supreme Court authority for the proposition that the right to travel is a fundamental constitutional right, and concludes that because that right was restrained, he suffered constitutional deprivations as a result of the Defendants' malicious prosecution.

There is no doubt that the constitution secures to individuals the right to freedom of movement. However, that right is not absolute – it may be compromised or

even forfeited by an individual's action. In discussing this notion in *Gerstein*, the Supreme Court stated:

> Even pretrial release may be accompanied by burdensome conditions that affect a significant restraint of liberty . . . Accordingly, we hold that the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to extended restraint of liberty following arrest.

420 U.S. at 114 (citation omitted). In other words, an individual may by his own conduct lose his right to unrestricted movement, and such a forfeiture is only unconstitutional if the individual has not been afforded a proper judicial determination that his confinement is warranted. Thus, there is no constitutional deprivation of the right to interstate travel when a convicted felon is sentenced to incarceration. Similarly, there is no constitutional deprivation when a criminal defendant, who has been afforded a probable cause hearing, is subject to travel restrictions on his bond. Accordingly, Albright's assertion that he was deprived of his right to interstate travel is insufficient to state a constitutional deprivation in support of his §1983 claim.

Albright next asserts that his equal protection rights were violated by the unfounded charges against him. Albright argues that, by charging him with an offense while knowing there was no probable cause to believe he had committed such a crime, while at the same time refraining from charging Veda Moore, an admitted cocaine user, the Defendants were enforcing the criminal laws in an unequal fashion. Albright suggests that he is "a member of a class of innocent persons," that Veda Moore is in a class of guilty persons, and the disparate treatment of the

two in this instance smacks of an equal protection violation.

In support of this argument, Albright cites *Wayte v. United States*, 470 U.S. 598 (1985) and *Falls v. Town of Dyer*, 875 F.2d 146 (7th Cir. 1989). In *Wayte*, the Supreme Court held that government cannot selectively enforce its criminal laws based upon unconstitutional classifications such as race, religion, or exercise of first amendment rights to free speech. 470 U.S. at 608. In *Falls*, the Seventh Circuit held that in addition to such types of improperly motivated selective prosecutions, it is also unconstitutional for government to selectively enforce its laws upon a single individual, either by formal declaration or informal policy. 875 F.2d at 148-49. Such would be unconstitutional as a bill of attainder. *Id.* at 149. Thus, these cases stand for the proposition that selective prosecution based upon unconstitutional classifications such as race or religion, and selective prosecutions against a single individual which amount to a bill of attainder, are unconstitutional and therefore can provide the basis of a civil rights action.

Albright's complaint does not satisfy these tests. Albright does not allege that he was prosecuted because of his membership in a suspect class, nor does he suggest that he was singled out for a baseless prosecution just because he was Kevin Albright. Instead, Albright alleges simply that he was prosecuted and should not have been – that he was in a class of innocent persons. As noted by the Defendants in their reply memorandum at p. 7:

> In the present case, Plaintiff does not allege (nor could he) that the Defendants sought to have him prosecuted specifically because he was an

> innocent person or a member of a class of innocent people. Rather, he claims only that the Defendants' use of flawed law enforcement techniques had the effect of causing innocent persons to be prosecuted, while the guilty went free. Under the authority cited in Plaintiff's response memoranda, however, discriminatory effect is not enough; equal protection claims require discriminatory design or purpose.

(Citation omitted). This Court agrees and finds that Albright's Complaint does not allege an underlying equal protection claim as a predicate to the §1983 malicious prosecution action.

Albright's final argument of a constitutional deprivation proves to be even more elusive. Albright asserts that by wrongfully prosecuting him, the Defendants created a "deprivation of [his] substantive due process right to be free from encroachments on liberty created by reckless state conduct." Albright argues that, by utilizing the services of an inherently unreliable informant, the state recklessly placed him in peril of being unjustly accused of wrongdoing, and consequently it had an affirmative duty under due process principles to use extra caution in charging him so as to protect him from this danger. In support of this proposition, Albright cites *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir. 1988), which adapted a tort principle to the due process clause and held that the constitution requires that a state provide affirmative assistance of someone it had previously placed in danger. 847 F.2d at 1220-23. In this Court's view, this doctrine is inapplicable to the present case and cannot afford the predicate constitutional deprivation for Albright's §1983 claims.

As noted by the Defendants in their response to the Plaintiff's supplemental memorandum at pp 2-3:

> Though Plaintiff advances a game effort to slip under the umbrella of *Archie*, this case has nothing in common with either *Archie* or any other case cited by Plaintiff dealing with civil rights liability for failing to provide public services.
>
> In *Archie*, as well as *White v. Rochford* and *DeShaney v. Winnebago County*, the injury was not directly inflicted by the state, but by a third party or by no party at all. Specifically, in *DeShaney*, the plaintiff was beaten by an abusive parent, and the state chaige with failing to prevent the beating. *DeShaney v. Winnebago County*, 489 U.S. 189 (1989). In *White*, two children were abducted by a third party after having been left unattended in a car on a highway after the police had arrested the adult driver of the car. *White v. Rochford*, 592 F.2d 381 (7th Cir. 1979). In *Archie*, the plaintiff became sick on her own and charged the City of Racine with failing to provide medical services in response to the plaintiff's request for assistance. *See also Ellsworth v. City of Racine*, 774 F.2d 182 (7th Cir. 1975) (failing to protect wife of undercover narcotics officer from retaliation by underworld figures), *cert. denied*, 89 L.Ed. 2d 574 (1986); *Beard v. O'Neil*, 728 F.2d 894 (7th Cir.) (FBI informant's failure to protect plaintiff from contract murder perpetrated by Chicago police officer), *cert. denied*, 469 U.S. 825 (1984); *Jackson v. City of Joliet*, 715 F.2d 1200 (7th Cir. 1983) (failure to protect occupants in a burning car), *cert. denied*, 465 U.S. 1049 (1984). In all these cases, the defendants were charged with failing to provide essential public

services, rather than wrongfully wielding the affirmative power of the state.

This Court agrees and finds that the Plaintiff's substantive due process allegation is insufficient to create the constitutional deprivation required for a viable §1983 malicious prosecution claim.

While Albright's Complaint adequately alleges facts to support a common law malicious prosecution claim, it does not, on the facts presented, establish a constitutional deprivation, which is essential to a viable §1983 malicious prosecution claim. Accordingly, this Court dismisses Counts I and II for failure to state a proper claim for relief.

III. Qualified Immunity

Oliver is also entitled to dismissal of the §1983 claims against him because he is entitled to qualified immunity under *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) . The doctrine of qualified immunity provides that public officials performing discretionary functions are immune to suits for damages unless the conduct which created the action amounted to a clear constitutional deprivation. *Doe v. Bobbit*, 881 F.2d 510, 511 (7th Cir. 1989) (citing *Harlow*, 457 U.S. at 818). As just discussed, in this Court's view Oliver's conduct did not even amount to a constitutional deprivation. However, to whatever extent that Oliver's conduct could be said to be unconstitutional as suggested by Albright, such would not create a violation of "clearly established statutory or constitutional rights of which a reasonable person would have known," *Harlow*, 457 U.S. at 818, and thus Oliver would possess immunity.

IV. Policy or Custom

An additional ground for dismissing Count I as it relates to the City is that it fails to sufficiently allege that any constitutional deprivation was the result of a policy or custom of the City. Albright's Complaint alleges that the constitutional deprivations imposed upon him resulted from Oliver's unchecked investigative activities and because the City clothed Oliver with discretion to conduct investigative operations as he saw fit. Albright argues that this constitutes a custom or policy under *Penbaur v. City of Cincinnati, et al.*, 475 U.S. 469 (1986). This Court disagrees.

In *St. Louis v. Praprotinik*, 485 U.S. 112 (1988), the Supreme Court held that, in the case of a subordinate who is not empowered to make policy, but merely is authorized to implement or execute that policy, an individual's actions which run afoul of constitutional protections do not constitute the policy of the municipality. 485 U.S. at 130. In this case, Albright has not alleged that Oliver had policy-making authority in the context of how to investigate suspects. Under the facts alleged, he may have had discretion about how to conduct criminal investigations on a case-by-case basis, but he did not have the authority to set policy on a city-wide basis as to how such investigations would be conducted. These facts do not allege a municipal policy. *See City of Oklahoma v. Tuttle*, 471 U.S. 808 (1985). To hold that Oliver's actions in this case could create corresponding liability for the City would be to permit respondeat superior liability, which was expressly precluded in *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

V. Common Law Claim for Malicious Prosecution

While Albright does not possess a civil rights action under the facts alleged, he does possess a common law malicious prosecution claim. Further, although the federal claims are now dismissed, his claim can appropriately remain within this court's jurisdiction under diversity. Accordingly, Albright's Motion to Amend the Second Amended Complaint to include allegations of diversity of citizenship is hereby granted, and this Court retains jurisdiction over Count III on that basis.

CONCLUSION

For the reasons set forth above, the Defendants' Motion to Dismiss (#23) is GRANTED in part and DENIED in part and the Plaintiff's Motion to amend (#27) is GRANTED and the Defendants are ordered to answer Count III within 21 days of the entry date of this Order.

ENTERED this 30th day of September, 1991.

/s/ Michael M. Mihm
Michael M. Mihm
United States District Judge

APPENDIX C

United States Court of Appeals

For the Seventh Circuit

Chicago, Illinois 60604

JUDGMENT – WITH ORAL ARGUMENT

Date: September 14, 1992

BEFORE: **Honorable** William J. Bauer, Chief Judge

Honorable Richard A. Posner, Circuit Judge

Honorable Floyd R. Gibson, Senior Circuit Judge*

No. 91-3746

KEVIN ALBRIGHT,
Plaintiff - Appellant

v.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation, and CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,
Defendants - Appellees

Appeal from the United States District Court for the Central District of Illinois, Peoria Division
No. 90 C 1221, Chief Judge Michael M. Mihm

This cause was heard on the record from the above mentioned District Court, and was argued by counsel.

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* Hon. Floyd R. Gibson of the Eighth Circuit is sitting by designation.

On consideration whereof, **IT IS ORDERED AND ADJUDGED** by this court that the judgment of the District Court is **AFFIRMED**, with costs, in accordance with the decision of this court entered this date.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

KEVIN ALBRIGHT, Plaintiff, vs. ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and THE CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation, Defendants.	)	No. 90-1221 **ORDER** (Filed Nov. 25, 1991)

THIS MATTER COMING ON BEFORE THE COURT on the Stipulation of the parties to the effect that Count III of plaintiff's Second Amended Complaint in the above captioned matter may be dismissed without prejudice pursuant to Rule 41(a)(1)(ii), Fed.R.Civ.P. and the court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that Count III of plaintiff's Second Amended Complaint in the above captioned matter be and is hereby dismissed without prejudice;

IT IS FURTHER ORDERED that nothing in this order shall preclude the defendants from raising any defense they had prior to the entry of this order;

IT IS FURTHER ORDERED that the parties shall pay their respective costs.

DONE IN OPEN COURT THIS 25th day of November, 1991.

BY THE COURT:

/s/ Michael M. Mihm
MICHAEL M. MIHM, JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

KEVIN ALBRIGHT, Plaintiff, vs. ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and THE CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation, Defendants.	)	No. 90-1221 **ORDER** (Filed Nov. 25, 1991)

THIS MATTER COMING ON BEFORE THE COURT on the Stipulation of the parties to the effect that the court may grant plaintiff leave to file a (Substituted MMM) Third Amended Complaint and that once filed, the court may consider that all motions and memoranda previously filed by the defendants directed against the earlier complaints shall apply with equal force and effect to the Third Amended Complaint and to the further effect that the court's order of September 30, 1991, dismissing Counts I and II of the plaintiff's earlier complaints shall apply with equal force to Counts I and II of the Third Amended Complaint, and the court having reviewed Counts I and II of the Third Amended Complaint and having concluded that its order of September 30, 1991, directed to Counts I and II of the earlier complaints

would apply with equal force and effect to Counts I and II of the plaintiff's Third Amended Complaint, and the court being otherwise fully advised in the premises,

IT IS HEREBY ORDERED that plaintiff be and is hereby granted leave to filed a Third Amended Complaint;

IT IS FURTHER ORDERED that defendants' motions directed to Counts I and II of the previous complaints be and hereby are deemed to apply with full force and effect to Counts I and II of plaintiff's Third Amended Complaint;

IT IS FURTHER ORDERED that this court's order of September 30, 1991, dismissing Counts I and II of the previous complaints shall apply with equal force and effect to Counts I and II of plaintiff's Third Amended Complaint and said order shall have operative effect after plaintiff's Third Amended Complaint is deemed filed upon and after the entry of this order.

IT IS FURTHER ORDERED that the court having ordered Count III of plaintiff's complaint dismissed without prejudice pursuant to Rule 41(a)(1)(ii), this matter is ready for final judgment;

IT IS, THEREFORE, ORDERED that the clerk be and is hereby directed to enter final judgment pursuant to Rule 58 in favor of the defendants and against the plaintiff.

DONE IN OPEN COURT THIS 25th day of November, 1991.

BY THE COURT:

/s/ Michael M. Mihm
MICHAEL M. MIHM, JUDGE

APPENDIX F

United States District Court

CENTRAL DISTRICT OF ILLINOIS

KEVIN ALBRIGHT,

Plaintiff,

vs.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, IL, an IL Municipal Corporation; MACOMB, ILLINOIS THE CITY OF, an Illinois Municipal Corporation,

Defendants.

JUDGMENT IN A CIVIL CASE

(Filed Nov. 26, 1991)

CASE NUMBER: No. 90-1221

X Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that Count III is dismissed without prejudice pursuant to Rule 41(a)(1)(ii); as to Counts I and II, judgment is entered in favor of defendants and against plaintiff. Parties are to bear their own costs.

/s/ MMM

/s/ Veronica L. Firguson
(By) Deputy Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF ILLINOIS
PEORIA DIVISION

KEVIN ALBRIGHT,

Plaintiff,

vs.

ROGER OLIVER, individually and in his official capacity as a police detective with the City of Macomb, Illinois, an Illinois Municipal Corporation and THE CITY OF MACOMB, ILLINOIS, an Illinois Municipal Corporation,

Defendants.

) No. 90-1221
)
) SUBSTITUTED
) THIRD
) AMENDED
) COMPLAINT
) FOR DAMAGES
) AND
) APPROPRIATE
) EQUITABLE
) RELIEF FOR
) VIOLATION OF
) CIVIL RIGHTS
) AND RELATED
) PENDENT
) CLAIMS

Plaintiff, by his attorneys, hereby submits his Third Amended Complaint as follows:

COUNT I

42 U.S.C. § 1983 – Violation of Constitutional Rights – Roger Oliver in His Official Capacity and City of Macomb

1. Plaintiff, Kevin Albright, is now a citizen and resident of St. Louis, Missouri but was during most of the proceedings hereinafter set forth a citizen and resident of the City of Macomb, County of McDonough, State of Illinois.

2. The defendant Roger Oliver is now and at all material times herein was a citizen and resident of the County of McDonough, State of Illinois and was duly appointed, employed and acting as an officer and agent of the City if Macomb, Illinois Police Department as a detective and in doing the things hereinafter alleged that he did, the defendant Roger Oliver was acting under the color, authority, and pretext of the statutes, ordinances, regulations, customs, and usages of the City of Macomb and State of Illinois and under the color and authority of his office.

3. The defendant City of Macomb is an Illinois municipal corporation organized under and pursuant to the laws of the State of Illinois and pursuant thereto has established a police department which department is broken into various divisions including a division consisting of detectives employed for the purpose of enforcing inter alia Illinois laws pertaining to the use, possession, sale, and other dispensation of controlled substances as defined by Illinois law to which division, the City of Macomb has by ordinance, custom, policy, and regulation conferred and delegated complete authority, limited only by financial ability, as to the means which those in the detective division such as the defendant Roger Oliver herein, will employ to enforce Illinois law relating to the use, possession, sale, and other dispensation of controlled substances.

4. This action arises under federal law, particularly the Civil Rights Act of 1871, 42 U.S.C. § 1983 as hereinbelow more fully appears.

5. This court has jurisdiction of this cause under and by virtue of Title 28 U.S.C. §§ 1331 and 1343, this being an action authorized by law to redress the deprivation under color of state law of rights, privileges and immunities secured to the plaintiff by the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

6. Each of the acts hereinafter alleged to have been done was done by the defendant Roger Oliver under color of the laws of the State of Illinois and under the color of the office of Roger Oliver as above described.

7. For the past 19 years, the defendant Roger Oliver has been employed as a detective by the City of Macomb, Illinois Police Department charged inter alia with responsibility for enforcing Illinois law proscribing the use, possession, sale, and other dispensation of controlled substances.

8. In that capacity, the defendant Roger Oliver is and was empowered by the City of Macomb to determine the means by which the aforementioned laws proscribing the use, sale and other dispensation of controlled substances were and are to be enforced and as such has been entrusted by the City of Macomb in particular the city council and mayor thereof, with discretionary monies to use for the purposes of purchasing controlled substances from individuals suspected of violating the law in order to arrest those individuals and/or otherwise use those individuals for further investigation into criminal activity as defined by Illinois law relative to the use, possession, sale, and other dispensation of controlled substances.

9. In the context of being so empowered by the City of Macomb, Illinois and by means of the funds given him by the mayor of the City of Macomb with approval of the city council, the defendant Roger Oliver has final decision making power and authority to determine the means by which the laws of the State of Illinois prohibiting the use, possession, sale and other dispensation of controlled substances are to be enforced by the City of Macomb, and, armed with that authority, the defendant Roger Oliver has undertaken to conduct investigations into suspected unlawful activity respecting the use, possession, sale, and other dispensation of controlled substances within the City of Macomb, State of Illinois by means of utilizing the services of so called paid informants.

10. In or about the beginning of March, 1987, and pursuant to tne policy of utilizing the services of paid informants for the purposes of ferreting out illegal controlled substance activity within the City of Macomb, the defendant Roger Oliver and the other police detectives received a request from one Veda Moore for "protection", from a former associate of hers who, with her was engaged in the use, possession, sale and other dispensation of controlled substances, and which former associate was said by Veda Moore to be threatening reprisals against said Veda Moore for Veda Moore's having failed to properly account for payment for the use, possession, sale and other dispensation of controlled substances, which "protection" Oliver agreed to give in exchange for services to be provided by Veda Moore as hereafter described.

11. Either at the time in early March, 1987, when she made the aforementioned request for "protection" or

shortly thereafter, Roger Oliver learned or should have learned that Veda Moore had just been released from a narcotics treatment facility where she had spent 30 days in treatment occasioned by her addiction to cocaine whereby it was beyond her physical and emotional power to control her craving for cocaine and other controlled substances and, accordingly, at or about the time she contacted him, the defendant Roger Oliver knew or should have known that Veda Moore remained addicted to cocaine whereby it was reckless and inherently unreasonable and unfair to place her in a position where she was being asked to make purchases of cocaine from supposed purveyors of cocaine and other controlled substances, in that, placed in that position suffering a cocaine addiction, Veda Moore became both a danger to herself and a menace to innocent persons, including plaintiff herein.

12. Notwithstanding his knowledge or what should have been his knowledge in the aforementioned respects, the defendant Roger Oliver and the other police detectives recklessly engaged the services of Veda Moore to serve as a confidential informant for him and the other police detectives in the employ of the City of Macomb for purposes of purporting to buy controlled substances from individuals said Veda Moore would identify to defendant Roger Oliver and other detectives as engaged in illegal controlled substance activity, pursuant to which arrangement, Veda Moore would be paid $50 to $75 for actual purchases of substances she would represent to the defendant Roger Oliver and other police detectives as being controlled substances, by reason of which Veda

Moore had an incentive to and did represent to the detectives such as the defendant Roger Oliver that she could make and had made purchases of putative controlled substances when in fact she had not and in so doing falsely implicated in criminal activity over 50 individuals including plaintiff herein, all resulting in aborted and dismissed prosecutions.

13. On or about July 17, 1987, at 1:25 p.m., under the circumstances as aforesaid, the aforementioned Veda Moore reported to the defendant Roger Oliver that she had made a purchase of cocaine from one John Albright, Jr. at Room 212 of the Pace Hotel in Macomb, Illinois.

14. Thereafter on or about September 2, 1987, after submitting to the Illinois State Police Crime Lab the substance Veda Moore represented was cocaine she had purchased from John Albright, Jr., on July 17, 1987, at the Pace Hotel in Macomb, Illinois, the defendant Roger Oliver learned that the substance was in fact baking powder.

15. Thereafter, on September 10, 1987, and recklessly not disclosing that he knew or should have known Veda Moore was addicted to cocaine and had lied to him respecting purchases she said she had made in order to be paid $50 or $75 per purchase, the defendant Roger Oliver testified before a McDonough County grand jury solely on the basis of what he represented Veda Moore had told him that John Albright, Jr., had sold Veda Moore a substance on July 17, 1987, at 1:25 p.m. from Room 212 of the Pace Hotel that he represented to her was cocaine and was therefore guilty of selling a so called "look alike" substance contrary to *Illinois Revised Statutes*, Ch. 56 ½

§ 1404(b), a felony, pursuant to which testimony the grand jury on September 10, 1987, returned an indictment against John Albright, Jr., and a warrant for his arrest was thereupon issued by the Circuit Court in and for McDonough County, Illinois.

16. After the Circuit Court in and for McDonough County, Illinois issued a warrant for the arrest of John Albright, Jr., based upon the testimony of Roger Oliver as aforesaid before the McDonough County grand jury which testimony in turn had been predicated upon the representations made by the aforementioned Veda Moore, Roger Oliver attempted to execute said warrant at the home of John Albright, Jr. at 2 Twig Road, Macomb, Illinois on or about September 28, 1987, only to learn that John Albright, Jr. was a man over 60 years of age who was a registered pharmacist and in all likelihood had never been in the Pace Hotel, a student and transient establishment, let alone in Room 212 at the Pace Hotel on July 17, 1987, at 1:25 p.m. and it was suggested to defendant Roger Oliver that perhaps the individual for whom Roger Oliver was looking was one John David Albright, one of the sons of John Albright, Jr.

17. Thereafter, on or about September 28, 1987, the defendant Roger Oliver without conducting any further investigation and without further attempting to determine or learn the circumstances of what it was Veda Moore had done on or about July 17, 1987, when she represented she had purchased cocaine from John Albright, Jr., at Room 212 of the Pace Hotel, recklessly scratched out the name "John Albright, Jr." on the warrant for the arrest of John Albright, Jr. and recklessly put

in its place the name "John David Albright" and undertook again to perfect service of the warrant this time on John David Albright, who on September 28, 1987, was in Chicago working where he had been for the preceding year.

18. Upon learning that a warrant for his arrest was in the process of being served upon him for purposes of effecting his arrest, the aforementioned John David Albright traveled to Macomb from Chicago where on or about October 1, 1987, he went to the Macomb Police Department and made his presence known to the defendant Roger Oliver for purposes of determining what the circumstances were pursuant to which defendant Roger Oliver desired to effect the arrest of said John David Albright and, upon learning those circumstances, the aforementioned John David Albright advised defendant Roger Oliver that any charge against him of selling any substance from Room 212 of the Pace Hotel in Macomb, Illinois on July 17, 1987, was an impossibility inasmuch as on that date and at that time he, John David Albright, had been working in Chicago where he had been living for the previous one year, pursuant to which advice the defendant Roger Oliver suggested that the individual for whom the defendant was perhaps looking was Kevin Albright, John David Albright's brother to which suggestion John David Albright was unknowing.

19. Thereafter and in the presence of John David Albright on October 1, 1987, defendant Roger Oliver placed a long distance telephone call to Veda Moore who by October 1, 1987, was in Florida, during which cail he advised her that the individual from whom she allegedly purchased cocaine on July 17, 1987, at the Pace Hotel in

Macomb, Illinois could not have been John Albright, Jr. or John David Albright and inquired whether or not it might have been Kevin Albright, pursuant to which inquiry, the defendant Roger Oliver, and without any further independent investigation or verification, recklessly accepted Veda Moore's statement during the aforementioned long distance telephone conversation that it was Kevin Albright from whom she had purchased cocaine at Room 212 of the Pace Hotel on July 17, 1987.

20. Thereafter, defendant Roger Oliver, on October 16, 1987, recklessly attested to a criminal information against plaintiff Kevin Albright charging plaintiff Kevin Albright with "on or about the 17th day of July, 1987 . . . knowingly and unlawfully distribut(ing) a look alike substance to Veda Moore . . . ", for which criminal information Roger Oliver then and there well knew or should have known that no probable cause existed as said criminal information was based upon the inherently unreliable statements and representations of the aforementioned Veda Moore whom Roger Oliver knew or should have known was addicted to cocaine and was providing information to the police, as plaintiff is informed, believes, and thereon alleges, solely for the purpose of securing funds for the purchase of controlled substances for her own use and benefit.

21. Thereafter, pursuant to the criminal information to which he had attested and caused to be filed against the plaintiff Kevin Albright, defendant Roger Oliver at first recklessly changed the arrest warrant which had theretofore been prepared first naming John Albright, Jr. and then John David Albright to now put the name Kevin

Albright without, however, making any attempt to further learn or understand the circumstances of the purported purchase and sale of cocaine on July 17, 1987, from Room 212 of the Pace Hotel, nor any further attempt to learn and ascertain what basis, if any, existed for the arrest of anyone for such alleged purchase and sale of cocaine as had been reported to him by the aforementioned Veda Moore, and, thereafter and specifically pursuant to the new information to which he had recklessly, wrongfully and without probable cause attested on October 16, 1987, defendant Roger Oliver on October 19, 1987, recklessly caused the issuance of a new arrest warrant for the arrest of Kevin Albright.

22. Upon learning that a criminal information had been sworn out by defendant Roger Oliver against him and that a warrant for his arrest had been issued, plaintiff Kevin Albright on or about October 19, 1987, turned himself in to defendant Roger Oliver and advised Roger Oliver that he had never sold cocaine or any substance to anyone at any time, let alone to Veda Moore on or about July 17, 1987, notwithstanding which information, the defendant Roger Oliver, without probable cause, caused plaintiff Kevin Albright to be arrested pursuant to the facially invalid warrant above described under a bail of $3,500 pursuant to which Kevin Albright was able to post the requisite 10% bond or $350, but was thereafter pursuant to the terms and conditions of said bond limited in his freedom of movement and association and in particular, was not permitted to travel outside the State of Illinois without court approval and was otherwise obliged to retain counsel at great expense and to appear in the Illinois Circuit Court for the Ninth Judicial Circuit at all

times required of him notwithstanding the fact that Kevin Albright as defendant Roger Oliver then and there fully well knew or should have known had never engaged in any criminal activity and had in particular never sold any controlled substance or any substance of any kind or description whatsoever to Veda Moore on July 17, 1987, or any other date.

23. Thereafter, during the pendency of the prosecution against him in state court, plaintiff, being then a senior at Western Illinois University and having been in the process of inquiring into job opportunities in the St. Louis, Missouri area, inquired of his lawyer in the underlying state court proceeding whether he could secure the state court's permission for him to travel to the State of Missouri for purposes of interviewing for said jobs, and his lawyer advised him that in order to secure the approval of the state court would require the expenditure of additional monies for attorney's fees, would require the attendance at a hearing, and would further risk the possibility that the state court might not give its approval to the interstate travel as requested by the plaintiff, in response to which, the plaintiff let the matter drop and did not travel to Missouri or anywhere else during the pendency of the state criminal action against him thereby causing delay in plaintiff securing employment.

24. Thereafter, on or about January 5, 1988, the criminal matter against the plaintiff herein which had been instituted by and because of the defendant Roger Oliver's recklessly accepting the inherently unreliable and contradictory information provided him by the aforementioned Veda Moore whom Roger Oliver knew or should have known was addicted to cocaine and who

otherwise had an incentive to provide information, valid or otherwise, and who by January 5, 1988, as Roger Oliver knew or should have known, was institutionalized in an intensive care narcotics addiction hospital in Kansas City, Missouri came on before the Illinois Circuit Court for preliminary hearing at which time the defendant Roger Oliver recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified and which information to which he testified was at odds with the testimony he had on September 10, 1987, given the McDonough County, Illinois grand jury respecting the same transaction, the Illinois Circuit Court found probable cause and bound the matter over for further proceedings.

25. Thereafter, on June 27, 1988, the Illinois Circuit Court entered an order dismissing the information against plaintiff herein for the reason that the information which had been filed did not state an offense under Illinois law.

26. The circumstances concerning the arrest, charging, and prosecution of plaintiff herein received widespread newspaper and radio coverage all of which associated plaintiff Kevin Albright's name with drug and narcotics dealing all of which was false and all to his damage.

27. By reason of defendant Roger Oliver's having relied solely upon the representations of someone addicted to controlled substances and who had a motive for giving false and incorrect information to the police in order that she could secure money for the purchase of additional controlled substances, and without having

instituted any independent means of verification of purported controlled substance purchases, such as the use of marked bills, use of eavesdropping devices, personal surveillance at all critical times, and by accepting without any independent means or verification or independent determinations of probable cause, three different identifications of the one person from whom she allegedly purchased what she falsely represented was cocaine, the defendant Roger Oliver acted recklessly and acted under circumstances where no reasonable police officer could have mistakenly believed he had probable cause to effect the charging, arrest, and prosecution of plaintiff Kevin Albright under the circumstances herein described.

28. By reason of Roger Oliver in implementing the policy of the City of Macomb as above described in paragraphs 9-26 hereof by paying Veda Moore funds with which she was able to illegally purchase controlled substances for her own use in consideration of purporting to purchase controlled substances from others under circumstances where the necessary effect, as defendants knew or should have known, was to subject innocent people such as plaintiff herein to arrest and prosecution, the defendant Roger Oliver and the City of Macomb recklessly subjected innocent people such as plaintiff Kevin Albright to prosecution under Illinois law prohibiting the illegal use, sale, and possession of controlled substances while at the same time not only not subjecting paid informants such as Veda Moore to the rigors and penalties of the Illinois criminal law relative to the use, sale, and possession of controlled substances, said defendants in fact facilitated, aided, and abetted those paid

informants such as Veda Moore in participating in conduct in violation of Illinois law prohibiting the use, sale and possession of controlled substances and thereby subjected plaintiff to the unequal protection of the law.

29. As a result of the defendants' action as hereinabove described, plaintiff was obliged to and did expend large sums of money in employing attorneys and agents in order to secure his vindication from the effects of defendants' unconstitutional actions and enforcement of unconstitutional policies as abovedescribed.

30. By reason of the foregoing, the defendant Roger Oliver and the City of Macomb in implementing the policies and procedures hereinabove described, have abridged plaintiff's rights, privileges and immunities secured him under the Constitution and laws of the United States as follows:

a. The substantive right, secured by the Equal Protection Clause, not to be deprived equal protection of the laws by a reckless and arbitrary public criminal prosecution where no criminal offense had been committed and perfected for the purpose or having the necessary effect of securing preferential treatment under the law for one party at the expense of another.

b. The substantive right, secured by the Fourteenth Amendment Due Process Clause, not to be deprived liberty in all its aspects including, but not limited to, rights secured by the Fourth Amendment, right to occupational liberty, rights to travel and association, and right to reputation free from taint and obloquy by a

false, reckless, arbitrary, defamatory and discriminatory public prosecution where no criminal offense had been committed.

c. The substantive right, protected by the Fourteenth Amendment Due Process Clause, not to be deprived property by arbitrary and reckless affirmative conduct under color of state law in the form of a public criminal prosecution where no crime had been committed.

31. As a direct and proximate result of defendant Roger Oliver's unlawful, unreasonable, and unconstitutional conduct in the particulars above described subjecting plaintiff to the deprivation of his rights, privileges, and immunities secured by the Constitution of the United States as above described, plaintiff was and is greatly injured in sums according to proof as follows:

a. He has been deprived his physical liberty and all things associated with physical liberty from October 18, 1987, to through and including June 27, 1988, in that by the terms of his bond, his liberty, freedom of associations and freedom of movement were circumscribed, limited, and impaired.

b. He has been obliged to, did pay, and became liable to pay large sums of money in defending himself and in securing the judicial declaration of his innocence of the charges caused to be brought against him by the defendants and to secure his freedom from the unlawful restraints placed upon his person and being by the actions of the defendants.

c. His good reputation has been brought into public disgrace and scandal among his neighbors and other worthy citizens of the

McDonough County, Illinois community, some of whom, not knowing his innocence, have believed and suspected and still believe and suspect that plaintiff was guilty of selling cocaine and related offenses.

d. He has been and is greatly hindered and prevented from transacting his affairs and business and has been unable to secure employment for himself in the Macomb, McDonough County area and moved to St. Louis for the purposes of securing employment.

e. He has been deprived his ability to secure credit.

f. He has had his good name irreparably damaged by extensive radio and newspaper coverage of the defendants' wrongful actions and all the proceedings incident thereto.

g. He has lost business and credit opportunities.

h. He has lost business and contractual relationships.

i. He has been deprived earnings and earnings capacity.

j. He has been otherwise devastated and ruined by the wrongful and malicious and oppressive actions perpetrated by the defendants in prosecuting plaintiff under circumstances where not only was plaintiff innocent of any criminal offense, the defendants unreasonably relied upon information that they knew or should have known was unreliable and false and in so doing greatly damaged the plaintiff.

32. Plaintiff is informed, believes, and thereon alleges that the defendant Roger Oliver acting in his official capacity as above described as a police detective with the City of Macomb, Illinois persists in his belief that his method of police detection of utilizing the services of paid informants under the circumstances hereinabove described wherein he unreasonably and unjustifiably relied upon the inherently contradictory and unreliable information of Veda Moore which she had a motive to give in order to subject plaintiff and others similarly situated to the damages suffered by plaintiff is an acceptable method of law enforcement by reason of which the defendant Roger Oliver in effectuating the policies of the City of Macomb relative to the enforcement of Illinois law pertaining to the use, possession, sale and other dispensation of controlled substances will, unless preliminarily and permanently restrained and enjoined by this court, continue to subject citizens of Macomb, Illinois to arrest and prosecution under circumstances where no probable cause exists and no reasonable police officer could think probable cause exists to subject such citizens to arrest and prosecution, all in violation of their rights under the Fourth and Fourteenth Amendments to the United States Constitution.

33. By reason of the immediately foregoing, plaintiff and others similarly situated have no adequate remedy at law and must seek thereby to invoke this court's powers of equity and pursuant thereto seek to preliminarily and permanently enjoin the utilization by defendant Roger Oliver in effectuating the policies of the City of Macomb of unreasonable means of police detection characterized by using paid informants whose information is inherently

unreliable and relying upon those informants where no reasonable police officer could or should so rely.

WHEREFORE, plaintiff prays for judgment against the defendants as follows:

a. Preliminary and permanent injunctive relief against the defendants Roger Oliver in his official capacity and the City of Macomb from hereafter utilizing the services of paid informants whom they either knew or should know are incapable of giving reliable information and from relying on such informants under circumstances where the effect is necessarily to deprive innocent citizens such as plaintiff herein the right to be secure in their persons and their right to equal protection of the laws.

b. Special damages in a sum according to proof.

c. General damages in the sum of $500,000.

d. Court costs, expert witness fees, if any, interest at the statutory rate.

e. Reasonable attorney's fees under 42 U.S.C. § 1988.

f. Such other and further relief as to the court seems just and appropriate under the circumstances.

COUNT II

Violation 42 U.S.C. § 1983 –
Roger Oliver in His Individual Capacity

1. Plaintiff Kevin Albright is now a citizen and resident of St. Louis, Missouri but was during most of the

proceedings hereinafter set forth a citizen and resident of the City of Macomb, County of McDonough, State of Illinois.

2. The defendant Roger Oliver in his individual capacity is now and was at all material times herein a citizen and resident of the County of McDonough, State of Illinois and was duly appointed, employed and acting as an officer and agent of the City of Macomb, Illinois Police Department as a detective and in doing the things hereinafter alleged that he did, the defendant Roger Oliver was acting individually and under the color of authority and pretext of the statutes, ordinances, regulations, customs and usages of the City of Macomb and State of Illinois.

3. This action arises under federal law, particularly the Civil Rights Act of 1871, 42 U.S.C. § 1983 as hereinbelow more fully appears.

4. This court has jurisdiction of this cause under and by virtue of Title 28 U.S.C. §§ 1331 and 1343, this being an action authorized by law to redress the deprivation under color of state law of rights, privileges and immunities secured plaintiff by the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution.

5. Each of the acts hereinafter alleged to have been was done was done by the defendant Roger Oliver individually but under color of the laws of the State of Illinois and under the color of the office of Roger Oliver as above described.

6. The past 19 years, defendant Roger Oliver has been employed as a detective by the City of Macomb, Illinois Police Department charge [sic] with inter alia the responsibility for enforcing Illinois law proscribing the use, possession, sale and other dispensation of controlled substances.

7. In that capacity, the defendant Roger Oliver is and has been empowered by the City of Macomb to determine the means by which the aforementioned laws proscribed in the use, possession, sale and other dispensation of controlled substances were and are to be enforced and as such has been entrusted by the City of Macomb with funds to use for the purpose of purchasing controlled substances from individuals suspected of violating the law for the purposes of arresting those individuals and/or otherwise using those individuals for further investigation into criminal activity as defined by Illinois law relative to the use, possession, sale and other dispensation of controlled substances.

8. In the context of the discretion conferred upon him by the City of Macomb, Illinois and by means of discretionary monies given him by the City of Macomb, Illinois, the defendant Roger Oliver has undertaken to conduct investigations and into suspected the unlawful activity respecting the use, possession, sale and other dispensation of controlled substances within the City of Macomb, State of Illinois by means of utilizing the services of so called paid informants.

9. In or about the beginning of March, 1987, and pursuant to his practice and procedure under color of law of utilizing these services of paid informants for the

purposes of ferreting out illegal controlled substance activity within the City of Macomb, the defendant Roger Oliver received a request from one Veda Moore for "protection" from a former associate of hers who, with her, was engaged in the use, possession, sale and other dispensation of controlled substances and which former associate was said by Veda Moore to be threatening reprisals against said Veda Moore for Veda Moore's having failed to properly account for profits for the use, possession, sale and other dispensation of controlled substances, which "protection" Oliver agreed to give in exchange for services to be provided by Veda Moore as hereafter described.

10. Either at that time in March, 1987, or shortly thereafter Roger Oliver learned or should have learned that Veda Moore at the time she made the aforementioned request for "protection" was addicted to cocaine whereby it was beyond her physical and emotional power to control her craving for cocaine and other controlled substances.

11. Notwithstanding his knowledge or what should have been his knowledge in the aforementioned respects, the defendant Roger Oliver and the other police detectives recklessly engaged the services of Veda Moore to serve as a confidential informant for him and the other police detectives in the employ of the City of Macomb for purposes of purporting to buy controlled substances from individuals said Veda Moore would identify to defendant Roger Oliver and other detectives an engaged in illegal controlled substance activity, pursuant to which arrangement, Veda Moore would be paid $50 to $75 for actual purchases of substances she would represent to the

defendant Roger Oliver and other police detectives as being controlled substances, by reason of which Veda Moore had an incentive to and did represent to the detectives such as the defendant Roger Oliver that she could make and had made purchases of putative controlled substances when in fact she had not and in so doing falsely implicated in criminal activity over 50 individuals including plaintiff herein, all resulting in aborted and dismissed prosecutions.

12. On or about July 17, 1987, at 1:25 p.m. under the circumstances aforesaid, the aforementioned Veda Moore reported to the defendant Roger Oliver that she had made a purchase of cocaine from John Albright, Jr., at Room 212 at the Pace Hotel in Macomb, Illinois.

13. Thereafter on or about September 2, 1987, after submitting to the Illinois State Police Crime Lab the substance Veda Moore represented was cocaine she had purchased from John Albright, Jr., on July 17, 1987, at the Pace Hotel in Macomb, Illinois, the defendant Roger Oliver learned that the substance was in fact baking powder.

14. Thereafter, on September 10, 1987, and recklessly not disclosing that he knew or should have known Veda Moore was addicted to cocaine and had lied to him respecting purchases she said she had made in order to be paid $50 or $75 per purchase, the defendant Roger Oliver testified before a McDonough County grand jury solely on the basis of what he represented Veda Moore had told him that John Albright, Jr., had sold Veda Moore a substance on July 17, 1987, at 1:25 p.m. from Room 212 of the Pace Hotel that he represented to her was cocaine

and was therefore guilty of selling a so called "look alike" substance contrary to *Illinois Revised Statutes*, Ch. 56 ½ § 1404(b), a felony, pursuant to which testimony the grand jury on September 10, 1987, returned an indictment against John Albright, Jr., and a warrant for his arrest was thereupon issued by the Circuit Court in and for McDonough County, Illinois.

15. After the Circuit Court in and for McDonough County, Illinois issued a warrant for the arrest of John Albright, Jr., based upon the testimony of Roger Oliver as aforesaid before the McDonough County grand jury which testimony in turn had been predicated upon the representations made by the aforementioned Veda Moore, Roger Oliver attempted to execute said warrant at the home of John Albright, Jr. at 2 Twig Road, Macomb, Illinois on or about September 28, 1987, only to learn that John Albright, Jr. was a man over 60 years of age who was a registered pharmacist and in all likelihood had never been in the Pace Hotel, a student and transient establishment, let alone in Room 212 at the Pace Hotel on July 17, 1987, at 1:25 p.m. and it was suggested to defendant Roger Oliver that perhaps the individual for whom Roger Oliver was looking was one John David Albright, one of the sons of John Albright, Jr.

16. Thereafter, on or about September 28, 1987, the defendant Roger Oliver without conducting any further investigation and without further attempting to determine or learn the circumstances of what it was Veda Moore had done on or about July 17, 1987, when she represented she had purchased cocaine from John Albright, Jr., at Room 212 of the Pace Hotel, recklessly

scratched out the name "John Albright, Jr." on the warrant for the arrest of John Albright, Jr. and recklessly put in its place the name "John David Albright" and undertook again to perfect service of the warrant this time on John David Albright, who on September 28, 1987, was in Chicago working where he had been for the preceding year.

17. Upon learning that a warrant for his arrest was in the process of being served upon him for purposes of effecting his arrest, the aforementioned John David Albright traveled to Macomb from Chicago where on or about October 1, 1987, he went to the Macomb Police Department and made his presence known to the defendant Roger Oliver for purposes of determining what the circumstances were pursuant to which defendant Roger Oliver desired to effect the arrest of said John David Albright and, upon learning those circumstances, the aforementioned John David Albright advised defendant Roger Oliver that any charge against him of selling any substance from Room 212 of the Pace Hotel in Macomb, Illinois on July 17, 1987, was an impossibility inasmuch as on that date and at that time he, John David Albright, had been working in Chicago where he had been living for the previous one year, pursuant to which advice the defendant Roger Oliver suggested that the individual for whom the defendant was perhaps looking was Kevin Albright, John David Albright's brother to which suggestion John David Albright was unknowing.

18. Thereafter and in the presence of John David Albright on October 1, 1987, defendant Roger Oliver placed a long distance telephone call to Veda Moore who by October 1, 1987, was in Florida, during which call he

advised her that the individual from whom she allegedly purchased cocaine on July 17, 1987, at the Pace Hotel in Macomb, Illinois could not have been John Albright, Jr. or John David Albright and inquired whether or not it might have been Kevin Albright, pursuant to which inquiry, the defendant Roger Oliver, and without any further independent investigation or verification, recklessly accepted Veda Moore's statement during the aforementioned long distance telephone conversation that it was Kevin Albright from whom she had purchased cocaine at Room 212 of the Pace Hotel on July 17, 1987.

19. Thereafter, defendant Roger Oliver, on October 16, 1987, recklessly attested to a criminal information against plaintiff Kevin Albright charging plaintiff Kevin Albright with "on or about the 17th day of July, 1987 . . . knowingly and unlawfully distribut(ing) a look alike substance to Veda Moore . . . ", for which criminal information Roger Oliver then and there well knew or should have known that no probable cause existed as said criminal information was based upon the inherently unreliable statements and representations of the aforementioned Veda Moore whom Roger Oliver knew or should have know was addicted to cocaine and was providing information to the police, as plaintiff is informed, believes, and thereon alleges, solely for the purpose of securing funds for the purchase of controlled substances for her own use and benefit.

20. Thereafter, pursuant to the criminal information to which he had attested and caused to be filed against the plaintiff Kevin Albright, defendant Roger Oliver at first recklessly changed the arrest warrant which had theretofore been prepared first naming John Albright, Jr.

and then John David Albright to now put the name Kevin Albright without, however, making any attempt to further learn or understand the circumstances of the purported purchase and sale of cocaine on July 17, 1987, from Room 212 of the Pace Hotel, nor any further attempt to learn and ascertain what basis, if any, existed for the arrest of anyone for such alleged purchase and sale of cocaine as had been reported to him by the aforementioned Veda Moore, and, thereafter and specifically pursuant to the new information to which he had recklessly, wrongfully and without probable cause attested on October 16, 1987, defendant Roger Oliver on October 19, 1987, recklessly caused the issuance of a new arrest warrant for the arrest of Kevin Albright.

21. Upon learning that a criminal information had been sworn out by defendant Roger Oliver against him and that a warrant for his arrest had been issued, plaintiff Kevin Albright on or about October 19, 1987, turned himself in to defendant Roger Oliver and advised Roger Oliver that he had never sold cocaine or any substance to anyone at any time, let alone to Veda Moore on or about July 17, 1987, notwithstanding which information, the defendant Roger Oliver, without probable cause, caused plaintiff Kevin Albright to be arrested pursuant to the facially invalid warrant above described under a bail of $3,500 pursuant to which Kevin Albright was able to post the requisite 10% bond or $350, but was thereafter pursuant to the terms and conditions of said bond limited in his freedom of movement and association and in particular, was not permitted to travel outside the State of Illinois without court approval and was otherwise obliged to retain counsel at great expense and to appear in the

Illinois Circuit Court for the Ninth Judicial Circuit at all times required of him notwithstanding the fact that Kevin Albright as defendant Roger Oliver then and there fully well knew or should have known had never engaged in any criminal activity and had in particular never sold any controlled substance or any substance of any kind or description whatsoever to Veda Moore on July 17, 1987, or any other date.

22. Thereafter, during the pendency of the prosecution against him in state court, plaintiff, being then a senior at Western Illinois University and having been in the process of inquiring into job opportunities in the St. Louis, Missouri area, inquired of his lawyer in the underlying state court proceeding whether he could secure the state court's permission for him to travel to the State of Missouri for purposes of interviewing for said jobs, and his lawyer advised him that in order to secure the approval of the state court would require the expenditure of additional monies for attorney's fees, would require the attendance at a hearing, and would further risk the possibility that the state court might not give its approval to the interstate travel as requested by the plaintiff, in response to which, the plaintiff let the matter drop and did not travel to Missouri or anywhere else during the pendency of the state criminal action against him thereby causing delay in plaintiff securing employment.

23. Thereafter, on or about January 5, 1988, the criminal matter against the plaintiff herein which had been instituted by and because of the defendant Roger Oliver's recklessly accepting the inherently unreliable and contradictory information provided him by the aforementioned Veda Moore whom Roger Oliver knew or

should have known was addicted to cocaine and who otherwise had an incentive to provide information, valid or otherwise, and who by January 5, 1988, as Roger Oliver knew or should have known, was institutionalized in an intensive care narcotics addiction hospital in Kansas City, Missouri came on before the Illinois Circuit Court for preliminary hearing at which time the defendant Roger Oliver recklessly failed to advise the court of the inherently unreliable nature of the information to which he testified and which information to which he testified was at odds with the testimony he had on September 10, 1987, given the McDonough County, Illinois grand jury respecting the same transaction, the Illinois Circuit Court found probable cause and bound the matter over for further proceedings.

24. Thereafter, on June 27, 1988, the Illinois Circuit Court entered an order dismissing the information against plaintiff herein for the reason that the information which had been filed did not state an offense under Illinois law.

25. The circumstances concerning the arrest, charging, and prosecution of plaintiff herein received widespread newspaper and radio coverage all of which associated plaintiff Kevin Albright's name with drug and narcotics dealing all of which was false and all to his damage.

26. By reason of defendant Roger Oliver's having relied solely upon the representations of someone addicted to controlled substance and who had a motive for giving false and incorrect information to the police in order that she could secure money for the purchase of

additional controlled substances, and without having instituted any independent means of verification of purported controlled substance purchases, such as the use of marked bills, use of eavesdropping devices, personal surveillance at all critical times, and by accepting without any independent means or verification or independent determinations of probable cause, three different identifications of the one person from whom she allegedly purchased what she falsely represented was cocaine, the defendant Roger Oliver acted recklessly and acted under circumstances where no reasonable police officer could have mistakenly believed he had probable cause to effect the arrest, charging and prosecution of plaintiff Kevin Albright under the circumstances herein described.

27. By reason of Roger Oliver paying Veda Moore funds with which she was able to illegally purchase controlled substances for her own use in consideration of purporting to purchase controlled substances from others under circumstances where the necessary effect, as defendant knew or should have known, was to subject innocent people such as plaintiff herein to arrest and prosecution, the defendant Roger Oliver and the City of Macomb recklessly subjected innocent people such as plaintiff Kevin Albright to prosecution under Illinois law prohibiting the illegal use, sale, and possession of controlled substances while at the same time not only not subjecting paid informants such as Veda Moore to the rigors and penalties of the Illinois criminal law relative to the use, sale, and possession of controlled substances, said defendant in fact facilitated, aided, and abetted those paid informants such as Veda Moore in participating in conduct in violation of Illinois law prohibiting the use,

sale and possession of controlled substances and thereby subjected plaintiff to the unequal protection of the law.

28. As a result of the defendant's action as hereinabove described, plaintiff was obliged to and did expend large sums of money in employing attorneys and agents in order to secure his vindication from the effects of defendant's unconstitutional actions and enforcement of unconstitutional policies as abovedescribed.

29. By reason of the foregoing, the defendant Roger Oliver in taking the actions hereinabove described, has abridged plaintiff's rights, privileges and immunities secured him under the Constitution and laws of the United States as follows:

a. The substantive right, secured by the Equal Protection Clause, not to be deprived equal protection of the laws by a reckless and arbitrary public criminal prosecution where no criminal offense had been committed and perfected for the purpose or having the necessary effect of securing preferential treatment under the law for one party at the expense of another.

b. The substantive right, secured by the Fourteenth Amendment Due Process Clause, not to be deprived liberty in all its aspects including, but not limited to, rights secured by the Fourth Amendment, right to occupational liberty, rights to travel and association, and right to reputation free from taint and obloquy by a false, reckless, arbitrary, defamatory and discriminatory public prosecution where no criminal offense had been committed.

c. The substantive right, protected by the Fourteenth Amendment Due Process Clause, not

to be deprived property by arbitrary and reckless affirmative conduct under color of state law in the form of a public criminal prosecution where no crime had been committed.

30. As a direct and proximate result of defendant Roger Oliver's unlawful, unreasonable, and unconstitutional conduct in the particulars above described subjecting plaintiff to the deprivation of his rights, privileges, and immunities secured by the Constitution of the United States as above described, plaintiff was and is greatly injured in sums according to proof as follows:

a. He has been deprived his physical liberty and all things associated with physical liberty from October 18, 1987, to through and including June 27, 1988, in that by the terms of his bond, his liberty, freedom of associations and freedom of movement were circumscribed, limited, and impaired.

b. He has been obliged to, did pay, and became liable to pay large sums of money in defending himself and in securing the judicial declaration of his innocence of the charges caused to be brought against him by the defendant and to secure his freedom from the unlawful restraints placed upon his person and being by the actions of the defendant.

c. His good reputation has been brought into public disgrace and scandal among his neighbors and other worthy citizens of the McDonough County, Illinois community, some of whom, not knowing his innocence, have believed and suspected and still believe and suspect that plaintiff was guilty of selling cocaine and related offenses.

d. He has been and is greatly hindered and prevented from transacting his affairs and business and has been unable to secure employment for himself in the Macomb, McDonough County area and moved to St. Louis for the purposes of securing employment.

e. He has been deprived his ability to secure credit.

f. He has had his good name irreparably damaged by extensive radio and newspaper coverage of the defendant's wrongful actions and all the proceedings incident thereto.

g. He has lost business and credit opportunities.

h. He has lost business and contractual relationships.

i. He has been deprived earnings and earnings capacity.

j. He has been otherwise devastated and ruined by the wrongful and malicious and oppressive actions perpetrated by the defendant in prosecuting plaintiff under circumstances where not only was plaintiff innocent of any criminal offense, the defendant unreasonably relied upon information that they knew or should have known was unreliable and false and in so doing greatly damaged the plaintiff.

31. Plaintiff is informed, believes, and thereon alleges that the defendant Roger Oliver acting in his official capacity as above described as a police detective with the City of Macomb, Illinois persists in his belief

that his method of police detection of utilizing the services of paid informants under the circumstances hereinabove described wherein he unreasonably and unjustifiably relied upon the inherently contradictory and unreliable information of Veda Moore which she had a motive to give in order to subject plaintiff and others similarly situated to the damages suffered by plaintiff is an acceptable method of law enforcement by reason of which the defendant Roger Oliver in effectuating the policies of the City of Macomb relative to the enforcement of Illinois law pertaining to the use, possession, sale and other dispensation of controlled substances will, unless preliminarily and permanently restrained and enjoined by this court, continue to subject citizens of Macomb, Illinois to arrest and prosecution under circumstances where no probable cause exists and no reasonable police officer could think probable cause exists to subject such citizens to arrest and prosecution, all in violation of their rights under the Fourth and Fourteenth Amendments to the United States Constitution.

32. By reason of the immediately foregoing, plaintiff and others similarly situated have no adequate remedy at law and must seek thereby to invoke this court's powers of equity and pursuant thereto seek to preliminarily and permanently enjoin the utilization by defendant Roger Oliver in effectuating the policies of the City of Macomb of unreasonable means of police detection characterized by using paid informants whose information is inherently unreliable and relying upon those informants where no reasonable police officer could or should so rely.

33. The actions of the defendant Roger Oliver were willful, wanton, malicious and reckless and conducted

with a willful, wanton and reckless disregard of the plaintiff's rights, feelings, and sensitivities and his rights under the United States Constitution.

WHEREFORE, plaintiff prays for judgment against the defendant Roger Oliver as follows:

a. Preliminary and permanent injunctive relief against the defendant Roger Oliver from hereafter utilizing the services of paid informants whom they either know or should know are incapable of giving reliable information and from relying on such informants under circumstances where the effect is necessarily to deprive innocent citizens such as plaintiff herein the right to be secure in their persons and their right to equal protection of the laws.

b. Special damages in a sum according to proof.

c. General damages in the sum of $500,000.

d. Punitive damages in the sum of $500,000 against the defendant Roger Oliver.

e. Court costs, expert witness fees, if any, interest at the statutory rate.

f. Reasonable attorney's fees under 42 U.S.C. § 1988.

g. Such other and further relief as to the court seems just and appropriate under the circumstances.

COUNT III

Malicious Prosecution – Common Law – Roger Oliver

1. This action arises under the principles of ancillary and pendent jurisdiction.

2. Plaintiff Kevin Albright is now a citizen and resident of St. Louis, Missouri but for all times relative herein was a citizen and resident of Macomb, Illinois.

3. Plaintiff is now and always has been a good and honest citizen and, as such, has never been guilty of any major criminal offenses and, until the time of the commission of the several occurrences by defendant as hereinafter mentioned, had never been suspected to have been guilty of controlled substance related offenses or the use, possession or sale or other dispensation of controlled substances and by reason of the foregoing, plaintiff, before the acts of the defendant as hereafter described, deservedly enjoyed and held the good opinion and credit of all his neighbors and associates.

4. The defendant Roger Oliver in his individual capacity is now and was at all material times herein a citizen and resident of the County of McDonough, State of Illinois and was duly appointed, employed and acting as an officer and agent of the City of Macomb, Illinois Police Department as a detective.

5. In that capacity, the defendant Roger Oliver is and has been empowered by the City of Macomb to determine the means by which the aforementioned laws proscribed in the use, possession, sale and other dispensation of controlled substances were and are to be

enforced and as such has been entrusted by the City of Macomb with discretionary monies to use for the purpose of purchasing controlled substances from individuals suspected of violating the law for the purposes of arresting those individuals and/or otherwise using those individuals for further investigation into criminal activity as defined by Illinois law relative to the use, possession, sale and other dispensation of controlled substances.

6. In the context of the discretion conferred upon him by the City of Macomb, Illinois and by means of discretionary monies given him by the City of Macomb, Illinois, the defendant Roger Oliver has undertaken to conduct investigations and into suspected the unlawful activity respecting the use, possession, sale and other dispensation of controlled substances within the City of Macomb, State of Illinois by means of utilizing the services of so called paid informants.

7. In or about the beginning of March, 1987, and pursuant to his practice and procedure under color of law of utilizing the services of paid informants for the purposes of ferreting out illegal controlled substance activity within the City of Macomb, the defendant Roger Oliver received a request from one Veda Moore for "protection" from a former associate of hers who, with her, was engaged in the use, possession, sale and other dispensation of controlled substances and which former associate was said by Veda Moore to be threatening reprisals against said Veda Moore for Veda Moore's having failed to properly account for profits for the use, possession, sale and other dispensation of controlled substances.

8. Either at that time in March, 1987, or shortly thereafter Roger Oliver learned or should have learned that Veda Moore at the time she made the aforementioned request for "protection" was addicated to cocaine whereby it was beyond her physical and emotional power to control her craving for cocaine and other controlled substances.

9. Notwithstanding his knowledge or what should have been his knowledge in the aforementioned respects, the defendant Roger Oliver undertook to and did engage the services of Veda Moore to serve as a confidential informant for him and other police detectives in the employ of the City of Macomb for the purposes of purporting to buy controlled substances from individuals said Veda Moore would identify to defendant Roger Oliver and other detectives as engaged in illegal controlled substance activity pursuant to which arrangement Veda Moore would be paid on a piecework basis for actual purchases of substances she would represent to the defendant Roger Oliver and other police detectives as being controlled substances, by reason of which Veda Moore had an incentive to represent to the detectives including the defendant Roger Oliver that she could make and had made purchases of putative controlled substances.

10. On or about July 17, 1987, at 1:25 p.m. under the circumstances aforesaid, the aforementioned Veda Moore reported to the defendant Roger Oliver that she had made a purchase of cocaine from John Albright, Jr., at Room 212 at the Pace Hotel in Macomb, Illinois.

11. Thereafter on or about September 2, 1987, after submitting to the Illinois State Police Crime Lab the substance Veda Moore represented was cocaine she had purchased from John Albright, Jr., on July 17, 1987, at the Pace Hotel in Macomb, Illinois, the defendant Roger Oliver learned that the substance was in fact baking powder.

12. Thereafter, on September 10, 1987, and not disclosing that he knew or should have known Veda Moore was addicted to cocaine and had lied to him respecting purchases she said she had made in order to be paid $50 or $75 per purchase, the defendant Roger Oliver testified before a McDonough County grand jury solely on the basis of what he represented Veda Moore had told him that John Albright, Jr., had sold Veda Moore a substance on July 17, 1987, at 1:25 p.m. from Room 212 of the Pace Hotel that he represented to her was cocaine and was therefore guilty of selling a so called "look alike" substance contrary to *Illinois Revised Statutes*, Ch. 56½ § 1404(b), a felony, pursuant to which testimony the grand jury on September 10, 1987, returned an indictment against John Albright, Jr., and a warrant for his arrest was thereupon issued by the Circuit Court in and for McDonough County, Illinois.

13. After the Circuit Court in and for McDonough County, Illinois issued a warrant for the arrest of John Albright, Jr., based upon the testimony of Roger Oliver as aforesaid before the McDonough County grand jury which testimony in turn had been predicated upon the representations made by the aforementioned Veda Moore, Roger Oliver attempted to execute said warrant at the home of John Albright, Jr. at 2 Twig Road, Macomb,

Illinois on or about September 28, 1987, only to learn that John Albright, Jr. was a man over 60 years of age who was a registered pharmacist and in all likelihood had never been in the Pace Hotel let alone in Room 212 at the Pace Hotel on July 17, 1987, at 1:25 p.m. and it was suggested to defendant Roger Oliver that perhaps the individual for whom Roger Oliver was looking was one John David Albright, one of the sons of John Albright, Jr.

14. Thereafter, on or about September 28, 1987, the defendant Roger Oliver without conducting any further investigation and without further attempting to determine or learn the circumstances of what it was Veda Moore had done on or about July 17, 1987, when she represented she had purchased cocaine from John Albright, Jr., at Room 212 of the Pace Hotel, scratched out the name "John Albright, Jr." on the warrant for the arrest of John Albright, Jr. and put in its place the name "John David Albright" and undertook again to perfect service of the warrant this time on John David Albright, who on September 28, 1987, was in Chicago working where he had been for the preceding year.

15. Upon learning that a warrant for his arrest was in the process of being served upon him for purposes of effecting his arrest, the aforementioned John David Albright traveled to Macomb from Chicago where on or about October 1, 1987, he went to the Macomb Police Department and made his presence known to the defendant Roger Oliver for purposes of determining what the circumstances were pursuant to which defendant Roger Oliver desired to effect the arrest of said John David Albright and, upon learning those circumstances, the aforementioned John David Albright advised defendant

Roger Oliver that any charge against him of selling any substance from Room 212 of the Pace Hotel in Macomb, Illinois on July 17, 1987, was an impossibility inasmuch as on that date and at that time he, John David Albright, had been working in Chicago where he had been living for the previous one year, pursuant to which advice the defendant Roger Oliver suggested that the individual for whom the defendant was perhaps looking was Kevin Albright, John David Albright's brother to which suggestion John Davis Albright was unknowing.

16. Thereafter and in the presence of John David Albright on September 28, 1987, defendant Roger Oliver placed a long distance telephone call to Veda Moore who by September 28, 1987, was in Florida, during which call he advised her that the individual from whom she allegedly purchased cocaine on July 17, 1987, at the Pace Hotel in Macomb, Illinois could not have been John Albright, Jr. or John David Albright and inquired whether or not it might have been Kevin Albright, pursuant to which inquiry, the defendant Roger Oliver, and without any further independent investigation or verification, accepted Veda Moore's statement during the aforementioned long distance telephone conversation that it was Kevin Albright from whom she had purchased cocaine at Room 212 of the Pace Hotel on July 17, 1987.

17. Thereafter, defendant Roger Oliver, on October 16, 1987, attested to a criminal information against plaintiff Kevin Albright charging plaintiff Kevin Albright with "on or about the 17th day of July, 1987 . . . knowingly and unlawfully distribut(ing) a look alike substance to Veda Moore . . . ", for which criminal information Roger Oliver then and there will well knew or should have known that

no probable cause existed as said criminal information was based upon the inherently unreliable statements and representations of the aforementioned Veda Moore whom Roger Oliver knew or should have known was addicted to cocaine and was providing information to the police, as plaintiff is informed, believes, and thereon alleges, solely for the purpose of securing funds for the purchase of controlled substances for her own use and benefit.

18. Thereafter, pursuant to the criminal information to which he had attested and caused to be filed against the plaintiff Kevin Albright, defendant Roger Oliver at first changed the arrest warrant which had theretofore been prepared first naming John Albright, Jr. and then John David Albright to now put the name Kevin Albright without, however, making any attempt to further learn or understand the circumstances of the purported purchase and sale of cocaine on July 17, 1987, from Room 212 of the Pace Hotel, nor any further attempt to learn and ascertain what basis, if any, existed for the arrest of anyone for such alleged purchase and sale of cocaine as had been reported to him by the aforementioned Veda Moore, and, thereafter and specifically pursuant to the new information to which he had wrongfully and without probable cause attested on October 16, 1987, defendant Roger Oliver on October 19, 1987, caused the issuance of a new arrest warrant for the arrest of Kevin Albright.

19. Upon learning that a criminal information had been sworn out by defendant Roger Oliver against him and that a warrant for his arrest had been issued, plaintiff Kevin Albright on or about October 19, 1987, turned himself in to defendant Roger Oliver and advised Roger Oliver that he had never sold cocaine or any substance to

anyone at any time, let alone to Veda Moore on or about July 17, 1987, notwithstanding which information, the defendant Roger Oliver, without probable cause, caused plaintiff Kevin Albright to be arrested pursuant to the facially invalid warrant above described under a bail of $3,500 pursuant to which Kevin Albright was able to post the requisite 10% bond or $350, but was thereafter pursuant to the terms and conditions of said bond limited in his freedom of movement and association and in particular, was not permitted to travel outside the State of Illinois without court approval and was otherwise obliged to appear in the Illinois Circuit Court for the Ninth Judicial circuit at all times required of him notwithstanding the fact that Kevin Albright as defendant Roger Oliver then and there fully well knew or should have known had never engaged in any criminal activity and had in particular never sold any controlled substance or any substance of any kind or description whatsoever to Veda Moore on July 17, 1987, or any other date.

20. Thereafter, during the pendency of the prosecution against him in state court, plaintiff, being a senior at Western Illinois University at the time the charges against him were preferred, and having been in the process of inquiring into job opportunities in the St. Louis, Missouri area, inquired of his lawyer in the underlying state court proceeding whether or not he could secure the state court's permission for him to travel to the State of Missouri for purposes of interviewing for said jobs, and his lawyer advised him that in order to secure the approval of the state court would require the expenditure of additional monies for attorney's fees, would require the attendance at a hearing, and would further risk the possibility

that the state court might not give its approval to the interstate travel as requested by the plaintiff, in response to which, the plaintiff let the matter drop and did not travel to Missouri or anywhere else during the pendency of the state criminal action against him thereby causing delay in plaintiff securing employment.

21. Thereafter, on or about January 5, 1988, the criminal matter against the plaintiff herein which had been instituted by and because of the defendant Roger Oliver's accepting the inherently unreliable and contradictory information provided him by the aforementioned Veda Moore whom Roger Oliver knew or should have known was addicted to cocaine and who otherwise had an incentive to provide information, valid or otherwise, and who by January 5, 1988, as Roger Oliver knew or should have known was institutionalized in an intensive care narcotics addiction hospital in Kansas City, Missouri came on before the Illinois Circuit Court for preliminary hearing at which time the defendant Roger Oliver failed to advise the court of the inherently unreliable nature of the information to which he testified and which information to which he testified was at odds with the testimony he had on September 10, 1987, given the McDonough County, Illinois grand jury respecting the same transaction, the Illinois Circuit Court found probable cause and bound the matter over for further proceedings.

22. Thereafter, on June 27, 1988, the Illinois Circuit Court entered an order dismissing the information against plaintiff herein for the reason that the information which had been filed did not state an offense under Illinois law.

23. The circumstances concerning the arrest, charging, and prosecution of plaintiff herein received widespread newspaper and radio coverage all of which associated plaintiff Kevin Albright's name with drug and narcotics dealing all of which was false and all to his damage.

24. By reason of defendant Roger Oliver's having relied solely upon the representations of someone addicted to controlled substances and who had a motive for giving false and incorrect information to the police in order that she could secure money for the purchase of additional controlled substances, and without having instituted any independent means of verification of purported controlled substance purchases, such as the use of marked bills, use of eavesdropping devices, personal surveillance at all critical times, and by accepting without any independent means or verification or independent determinations of probable cause, three different identifications of the one person from whom she allegedly purchased what she represented was cocaine, the defendant Roger Oliver acted unreasonably and acted under circumstances where no reasonable police officer could have mistakenly believed he had probable cause to effect the arrest, charging and prosecution of plaintiff Kevin Albright under the circumstances herein described.

25. By reason of Roger Oliver in implementing the policy of the City of Macomb as above described by paying Veda Moore funds with which she was able to illegally purchase controlled substances for her own use in consideration of purporting to purchase controlled substance for the purposes of subjecting innocent people such as plaintiff herein to arrest and prosecution, the

defendant Roger Oliver and the City of Macomb have subjected people such as plaintiff Kevin Albright to the unequal protection of the laws, by reason of all of which, defendant Roger Oliver's actions were reckless and malicious.

26. As a direct and proximate result of the defendant Roger Oliver's reckless, malicious actions in effecting the arrest and charging of plaintiff herein under circumstances where he had no probable cause to believe plaintiff had committed any criminal offense under the laws of the State of Illinois, the plaintiff herein has been greatly injured in sums according to proof as follows:

a. He has been deprived his physical liberty and all things associated with physical liberty from October 18, 1987, to through and including June 27, 1988, in that by the terms of his bond, his liberty, freedom of associations and freedom of movement were circumscribed, limited, and impaired.

b. He has been obliged to, did pay, and became liable to pay large sums of money in defending himself and in securing the judicial declaration of his innocence of the charges caused to be brought against him by the defendant and to secure his freedom from the unlawful restraints placed upon his person and being by the actions of the defendant.

c. His good reputation has been brought into public disgrace and scandal among his neighbors and other worthy citizens of the McDonough County, Illinois community, some of whom, not knowing his innocence, have believed and suspected and still believe and

suspect that plaintiff was guilty of selling cocaine and related offenses.

d. He has been and is greatly hindered and prevented from transacting his affairs and business and has been unable to secure employment for himself in the Macomb, McDonough County area and moved to St. Louis for the purposes of securing employment.

e. He has been deprived his ability to secure credit.

f. He has had his good name irreparably damaged by extensive radio and newspaper coverage of the defendant's wrongful actions and all the proceedings incident thereto.

g. He has lost business and credit opportunities.

h. He has lost business and contractual relationships.

i. He has been deprived earnings and earnings capacity.

j. He has been otherwise devastated and ruined by the wrongful and malicious and oppressive actions perpetrated by the defendant in prosecuting plaintiff under circumstances where not only was plaintiff innocent of any criminal offense, the defendant unreasonably relied upon information that they knew or should have known was unreliable and false and in so doing greatly damaged the plaintiff.

27. Plaintiff is informed, believes, and thereon alleges that the defendant Roger Oliver acting in his official capacity as above described as a police detective with the City of Macomb, Illinois persists in his belief

that his method of police detection of utilizing the services of paid informants under the circumstances hereinabove described wherein he unreasonably and unjustifiably relied upon the inherently contradictory and unreliable information of Veda Moore which she had a motive to give in order to subject plaintiff and others similarly situated to the damages suffered by plaintiff is an acceptable method of law enforcement by reason of which the defendant Roger Oliver in effectuating the policies of the City of Macomb relative to the enforcement of Illinois law pertaining to the use, possession, sale and other dispensation of controlled substances will, unless preliminarily and permanently restrained and enjoined by this court, continue to subject citizens of Macomb, Illinois to arrest and prosecution under circumstances where no probable cause exists and no reasonable police officer could think probable cause exists to subject such citizens to arrest and prosecution, all in violation of their rights under the Fourth and Fourteenth Amendments to the United States Constitution.

28. By reason of the immediately foregoing, plaintiff and others similarly situated have no adequate remedy at law and must seek thereby to invoke this court's powers of equity and pursuant thereto seek to preliminarily and permanently enjoin the utilization by defendant Roger Oliver in effectuating the policies of the City of Macomb of unreasonable means of police detection characterized by using paid informants whose information is inherently unreliable and relying upon those informants where no reasonable police officer could or should so rely.

29. The actions of the defendant Roger Oliver were willful, wanton, malicious and reckless and conducted

with a willful, wanton and reckless disregard of the plaintiff's rights, feelings, and sensitivities and his rights under the United States Constitution.

WHEREFORE, plaintiff prays for judgment against the defendant Roger Oliver as follows:

a. Preliminary and permanent injunctive relief against the defendant Roger Oliver from hereafter utilizing the services of paid informants whom they either know or should know are incapable of giving reliable information and from relying on such informants under circumstances where the effect is necessarily to deprive innocent citizens such as plaintiff herein the right to be secure in their persons and their right to equal protection of the laws.

b. Special damages in a sum according to proof.

c. General damages in the sum of $500,000.

d. Punitive damages in the sum of $500,000 against the defendant Roger Oliver.

e. Court costs, expert witness fees, if any, interest at the statutory rate.

f. Reasonable attorney's fees under 42 U.S.C. § 1988.

g. Such other and further relief as to the court seems just and appropriate under the circumstances.

Respectfully Submitted:

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Macomb, Illinois 61455
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/s/ John H. Bisbee
JOHN H. BISBEE

DATED: November 25, 1991

CERTIFICATE OF MAILING AND FACSIMILE TRANSMISSION

I hereby certify that I have on this 25th day November, 1991, deposited a true and correct copy of the foregoing SUBSTITUTED THIRD AMENDED COMPLAINT FOR DAMAGES AND APPROPRIATE EQUITABLE RELIEF FOR VIOLATION OF CIVIL RIGHTS AND RELATED PENDENT CLAIMS in the United States mails, postage prepaid and by facsimile transmission to Mr. James Sotos, Schirott & Associates, P.C., 105 E. Irving Park Road, P.O. Box 247, Itasca, Illinois 60143.

/s/ John H. Bisbee

PLAINTIFF DEMANDS TRIAL BY A JURY OF SIX (6)

APPENDIX H

8-101. Limitation of actions

§ 8-101. No civil action may be commenced in any court against a local entity or any of its employees for any injury unless it is commenced within one year from the date that the injury was received or the cause of action accrued. For purposes of this Article, the term "civil action" includes any action, whether based upon the common law or statutes or Constitution of this State.